No. 2355

United States

Circuit Court of Appeals

For the Ninth Circuit.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM A. HANSFORD,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Rules of U.S. Circuit
Court of Appeals
854

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Index.

Names and Addresses of Attorneys of Record.

Messrs. NICHOLS & WILSON, of Billings, Montana,

Attorneys for Plaintiff and Defendant in Error.

J. H. JOHNSTON, Esq., of Billings, Montana,

GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Defendant and Plaintiff in Error. [1*]

In the District Court of the United States in and for the District of Montana.

No. 290.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED that on the 18th day of November, 1912, Transcript on Removal from the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, was duly filed herein, in the words and figures following, to wit: [2]

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*Page-number appearing at foot of page of original certified Record.

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Complaint.

Comes now the plaintiff, and, stating his cause of action against the defendant herein, complains and alleges:

1. That the defendant is a corporation, engaged in the wholesale grocery business, and having its principal place of business in the State of Montana, in the city of Billings.

2. That the plaintiff entered into the service of the defendant as a laborer in its wholesale house in the city of Billings, Montana, on the 1st day of June, 1912, and remained continuously in its service until the 22d day of June, 1912.

3. That as such employee, the plaintiff was engaged in receiving and distributing goods and in assembling goods for shipment upon the first floor of defendant's warehouse in said city of Billings.

4. That during the time plaintiff was in defendant's employ and at the time of the accident and injury herein complained of, the said defendant had

constructed and maintained upon the first floor of its said warehouse a platform or staging about thirty feet long by twenty feet wide, which was reached by an upright ladder from the main floor, and which was used and intended for use in the storage of goods. That said platform and staging was about nine feet above the floor; and was supported by upright pillars ten by twelve inches in size, set about ten feet apart, and was constructed of common pine lumber or boards one inch thick and twelve inches wide, laid on two by four inch joists or stringers, and said platform was without railing of any kind about the outside thereof. That at the outer edge of said platform, the defendant had placed a board about ten feet in length and of the same kind and dimension as those used [3] in the floor of said platform, which was without support of any kind except at either end, where it rested upon one-inch cleats fastened to the upright posts supporting said platform, as above mentioned.

5. That upon the 21st day of June, 1912, while the plaintiff was yet in defendant's employ, he received an order which required the assembling for shipment, among other things, of several large crated coffee cans, which coffee cans at the time were located upon the above-described platform; that plaintiff was thereupon requested to go upon said platform and hand down the requisite number of said cans to another employee stationed upon the floor to receive them; that plaintiff in pursuance of such direction went upon said platform, and, while handing one of said cans down to his fellow employee, stepped upon

the board located at the edge of said platform, as herein described, and thereupon said board broke, precipitating the plaintiff to the floor below; that plaintiff fell upon his right elbow and chest, and thereby received serious and permanent injuries, as hereinafter alleged.

6. Plaintiff alleges that the defendant was negligent in the construction and maintenance of said platform in that it had failed to provide or have any railing along the outer edge of said platform, and had failed to provide sufficient support under the board which extended beyond the edge of said platform and upon which plaintiff stepped, as alleged, and the breaking of which caused plaintiff to fall and receive the injuries as alleged.

7. That the negligence of the defendant in its failure to provide a suitable railing along the outside edge of said platform and in its failure to provide sufficient supports under the said board caused the plaintiff to fall and to receive the injuries as alleged.

8. That the plaintiff was at all times in the exercise of due care and caution, and he alleges that the injuries complained of were wholly due to the negligence of the defendant, as alleged.

9. That by the fall aforesaid, both bones of the plaintiff's right forearm were broken, his right elbow joint was dislocated and [4] his chest crushed and injured. That the injuries aforesaid caused plaintiff much physical suffering and mental anguish, and will continue so to do, and plaintiff alleges that the said injuries are permanent in character.

10. That the injury to plaintiff's arm is of such a character as to now require a surgical operation, and will further occasion plaintiff much physical suffering and expense.

11. That plaintiff has not since said injury been able to do any manual labor, and has now, and will during the remainder of his life, have but a limited and partial use of his said arm, and his ability to perform manual labor is now permanently impaired. That prior to said injury, plaintiff was physically strong, and was able to earn wages in the sum of Seventy-five Dollars ($75.00) per month.

12. That the plaintiff, on account of the injuries aforesaid, has incurred, and will hereafter incur, a liability for the service of a surgeon in the sum of Two Hundred Seventy-five Dollars ($275.00), hospital fees, nurse hire and medicines in the sum of Two Hundred Twenty-five Dollars (225.00).

13. That the plaintiff has been damaged by reason of the alleged negligence of the defendant, as follows:

In the expense for surgical aid, medicines and hospital care and attention.....$500.00

In the loss of time and ability to earn wages from the date of said injury to the commencement of this action in the sum of..$225.00

In the loss of future earnings, and for his physical and mental pain and anguish already endured, and which he will endure in the future $25,000.00

14. That no part of plaintiff's said claim for dam-

ages against the defendant has been paid, and plaintiff is now the owner of said claim.

Wherefore, plaintiff prays judgment against the defendant in the sum of Twenty-five Thousand Seven Hundred Twenty-five Dollars [5] ($25,725.00), and for his costs and disbursements herein.

NICHOLS & WILSON,
Attorneys for Plaintiff.

State of Montana,
County of Yellowstone,—ss.

William A. Hansford, being first duly sworn, on oath states:

That he is the plaintiff named in the foregoing complaint; that he has read the said complaint and knows its contents, and that each of the statements therein contained are true of his personal knowledge.

WILLIAM A. HANSFORD.

Subscribed and sworn to before me this 23d day of September, 1912.

[NS.] B. F. HARRIS,
Notary Public for the State of Montana, Residing at Billings, Montana.

My commission expires Dec. 23d, 1913.

Filed Sept. 28, 1912. [6]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY,
a Corporation,

Defendant.

Summons.

The State of Montana Sends Greeting to the Above-named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS my hand and the seal of said court this 28th day of September, 1912.

[Court Seal]

LORIN T. JONES,
Clerk.
By Fred P. Rixon,
Deputy Clerk.

Sheriff's Office,
State of Montana,
County of Yellowstone,—ss.

I hereby certify that I received the within summons and a copy of the complaint in said action on the 28th day of September, A. D. 1912, and personally served the same on the 28th day of September, A. D. 1912, on T. J. McDonough, as manager of Stone-Ordean-Wells Company, a corporation, being the defendant named in said summons, by delivering to and leaving with said defendant, personally, in the county of Yellowstone, State of Montana, a copy of said summons and of said complaint.

Dated at Billings, Montana, this 28th day of September, A. D. 1912.

J. C. ORRICK,
Sheriff.
By E. S. Judd,
Deputy Sheriff.

SHERIFF'S FEES.

Total sheriff's fees	$1.20
Mileage	$ .20
Copies	$
Service	$1.00

Returned and filed this 28th day of September, A. D. 1912. Lorin T. Jones, Clerk. By Fred P. Rixon, Deputy Clerk. [7]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY,
a Corporation,

Defendant.

Stipulation [Extending Defendant's Time to Appear, etc.].

The above-named plaintiff hereby stipulates and agrees that the above-named defendant may have until the 28th day of October, 1912, inclusive, within which to appear in the above-entitled action and within which to demur, answer or plead to the complaint of the plaintiff filed in said action.

October 17, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 17, 1912. [8]

[Title of Court and Cause.]

Demurrer.

Comes now the above-named defendant and demurs to the complaint of the plaintiff on file herein, upon the ground and for the reason that said com-

plaint does not state facts sufficient to constitute a cause of action.

J. H. JOHNSTON,
Attorney for Defendant.

Due service of the within Demurrer and receipt of copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

Filed October 26, 1912. [9]

[Title of Court and Cause.]

Notice That Petition for Removal and Bond will be Filed.

To William A. Hansford, the Above-named Plaintiff, and Nichols & Wilson, His Attorneys:

You and each of you will please take notice, that the above-named defendant will this day file in the above-named court, in the above-entitled action, a petition and bond for the removal of the above-entitled action from the above-named court to the District Court of the United States in and for the District of Montana.

A true copy of said petition and bond are herewith served upon you, and made a part of this notice.

Signed and dated October 26, 1912.

J. H. JOHNSTON,
Attorney for Defendant and Petitioner. [10]

[Title of Court and Cause.]

Petition for Removal to the District Court of the United States for the District of Montana.

Your petitioner, Stone-Ordean-Wells Company, a corporation, respectfully shows this Honorable Court:

That it is the defendant in this suit, which is of a civil nature, at law, and that the matter and amount in dispute in this cause exceeds the sum and value of three thousand dollars, exclusive of interest and costs, and that the amount prayed for in the complaint herein is the sum of twenty-five thousand seven hundred twenty-five and no-100 dollars.

That the controversy herein is between citizens of different States; that the plaintiff, William A. Hansford, was at the time of the commencement of this action and still is a citizen of the State of Montana, residing at Billings, Yellowstone County, Montana, and that your petitioner, Stone-Ordean-Wells Company, a corporation, was at the time of the commencement of this action, and still is a corporation, organized, existing and doing business under and by virtue of the laws of Maine, and a citizen and resident of the State of Maine, and is not now, and at the commencement of this action was not, a citizen or resident of the State of Montana; and that your petitioner desires to remove this suit before the trial thereof into the District Court of the United States, in and for the District of Montana.

That your petitioner offers herewith a bond with good and sufficient sureties, for its entering in the

District Court of the United States for the District of Montana, within thirty days from the date of filing this petition, a certified copy of the record in this action and for paying all costs that may be awarded by the said District Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

That your petitioner therefore prays that the said surety and [11] bond may be accepted, that this suit may be removed into the District Court of the United States in and for the District of Montana, pursuant to the statutes of the United States, in such case made and provided; and that no other proceedings may be had herein in this court.

And thus will your petitioner ever pray.

STONE-ORDEAN-WELLS COMPANY.
By W. L. MACKAY,
Its Asst. Treasurer,
Petitioner and said Defendant.
J. H. JOHNSTON,
Attorney for Petitioner and Defendant.

State of Montana,
County of Yellowstone,—ss.

W. L. Mackay, being first duly sworn, deposes and says: That he is an officer, to wit, Assistant Treasurer of Stone-Ordean-Wells Company, the corporation named as defendant in the above-entitled action and petitioner above named; that as such officer of said corporation he makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof,

and that the matters and things therein stated are true of his own knowledge.

W. L. MACKAY.

Subscribed and sworn to before me this 25th day of October, 1912.

[Seal] J. H. JOHNSTON,

Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914. [12]

[Title of Court and Cause.]

Bond on Removal to the District Court of the United States for the District of Montana.

Know all men by these presents, That we, Stone-Ordean-Wells Company, a Maine corporation, defendant herein, as principals, and W. H. Donovan and L. H. Drake, Jr., of Billings, Montana, as sureties, are held and firmly bound unto William A. Hansford, plaintiff herein, in the penal sum of Two Hundred Dollars, for the payment of which, well and truly to be made unto the said William A. Hansford, his heirs, personal representatives, and assigns, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that, whereas, the said Stone-Ordean-Wells Company has filed its petition in the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone, for the removal of a certain cause therein pending, wherein the said Will-

iam A. Hansford is plaintiff, and the said Stone-Ordean-Wells Company, a corporation, is defendant, and the District Court of the United States in and for the District of Montana.

Now, if the said Stone-Ordean-Wells Company shall enter in the said District Court of the United States within thirty days from the date of filing the said petition herein a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, said Stone-Ordean-Wells Company has caused its corporate name to be hereunto subscribed by its assistant Treasurer, and the said W. H. Donovan and L. H. Drake, Jr., sureties, [13] have hereunto set their hands and seals this 26th day of October, 1912.

STONE-ORDEAN-WELLS COMPANY.
By W. L. MACKAY,
Its Asst. Treasurer,
W. H. DONOVAN. [Seal]
L. H. DRAKE, Jr. [Seal]

State of Montana,
County of Yellowstone,—ss.

W. H. Donovan and L. H. Drake, Jr., being first duly sworn, each for himself deposes and says: That he is a citizen and resident of Billings, Yellowstone County, Montana; that he is a freeholder in said county and is worth the sum of Two Hundred Dol-

lars over and above all just debts and liabilities, and over and above all property exempt from sale on execution.

W. H. DONOVAN.
L. H. DRAKE, Jr.

Subscribed and sworn to before me this 26th day of October, 1912.

[Seal] J. H. JOHNSTON,
Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

The foregoing undertaking and the sureties thereof are hereby approved this .... day of October, 1912.

....,
Judge of said District Court.

Due service of the within notice and receipt of a copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

Filed October 26, 1912. [14]

[Title of Court and Cause.]

Petition for Removal to the District Court of the United States for the District of Montana.

Your petitioner, Stone-Ordean-Wells Company, a corporation respectfully shows this Honorable Court:

That it is the defendant in this suit, which is of a civil nature, at law, and that the matter and amount

in dispute in this cause exceeds the sum and value of three thousand dollars, exclusive of interest and costs, and that the amount prayed for in the complaint herein is the sum of twenty-five thousand seven hundred twenty-five and no-100 dollars.

That the controversy herein is between citizens of different states; that the plaintiff, William A. Hansford, was at the time of the commencement of this action and still is a citizen of the State of Montana, residing at Billings, Yellowstone County, Montana, and that your petitioner Stone-Ordean-Wells Company, a corporation, was at the time of the commencement of this action, and still is, a corporation, organized, existing and doing business under and by virtue of the laws of Maine, and a citizen and resident of the State of Maine, and is not now, and at the commencement of this action was not, a citizen or resident of the State of Montana; and that your petitioner desires to remove this suit before the trial thereof into the District Court of the United States, in and for the District of Montana.

That your petitioner offers herewith a bond with good and sufficient sureties, for its entering in the District Court of the United States for the District of Montana, within thirty days from the date of filing this petition, a certified copy of the record in this action and for paying all costs that may be awarded by the said District Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

That your petitioner therefore prays that the said surety and bond may be accepted, that this suit

may be removed into the [15] District Court of the United States in and for the District of Montana, pursuant to the statutes of the United States, in such case made and provided; and that no other proceedings may be had herein in this court.

And thus will your petitioner ever pray.

STONE-ORDEAN-WELLS COMPANY.
By W. L. MACKAY,
Its Asst. Treasurer,
Petitioner and Said Defendant.
J. H. JOHNSTON,
Attorney for Petitioner and Defendant.

State of Montana,
County of Yellowstone,—ss.

W. L. Mackay, being first duly sworn, deposes and says: That he is an officer, to wit, Assistant Treasurer of Stone-Ordean-Wells Company, the corporation named as defendant in the above-entitled action and petitioner above named; that as such officer of said corporation he makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge.

W. L. MACKAY.

Subscribed and sworn to before me this 25th day of October, 1912.

[Seal] J. H. JOHNSTON,
Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

Due service of the within petition and receipt of a copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

Filed Oct. 26, 1912. [16]

[Title of Court and Cause.]

Bond on Removal to the District Court of the United States for the District of Montana.

Know all men by these presents, That we, Stone-Ordean-Wells Company, a Maine corporation, defendant herein, as principal, and W. H. Donovan and L. H. Drake, Jr., of Billings, Montana, as sureties, are held and firmly bound unto William A. Hansford, plaintiff herein, in the penal sum of Two Hundred Dollars, for the payment of which, well and truly to be made unto the said William A. Hansford, his heirs, personal representatives, and assigns, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that, whereas, the said Stone-Ordean-Wells Company has filed its petition in the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone, for the removal of a certain cause therein pending, wherein the said William A. Hansford is plaintiff, and the said Stone-Ordean-Wells Company, a corporation, is defendant,

to the District Court of the United States in and for the District of Montana.

Now, if the said Stone-Ordean-Wells Company shall enter in the said District Court of the United States within thirty days from the date of filing the said petition herein a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, said Stone-Ordean-Wells Company has caused its corporate name to be hereunto subscribed by its assistant Treasurer, and the said W. H. Donovan and L. H. Drake, Jr., sureties, have hereunto set their hands and seals this 26th day [17] of October, 1912.

STONE-ORDEAN-WELLS COMPANY.
By W. L. MACKAY,
Its Asst. Treasurer,
W. H. DONOVAN. [Seal]
L. H. DRAKE, Jr. [Seal]

State of Montana,
County of Yellowstone,—ss.

W. H. Donovan and L. H. Drake, Jr., being first duly sworn, each for himself deposes and says: That he is a citizen and resident of Billings, Yellowstone County, Montana; that he is a freeholder in said county and is worth the sum of Two Hundred Dollars over and above all just debts and liabilities,

and over and above all property exempt from sale on execution.

W. H. DONOVAN.
L. H. DRAKE, Jr.

Subscribed and sworn to before me this 26th day of October, 1912.

[Seal] J. H. JOHNSTON,
Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

The foregoing undertaking and the sureties thereof are hereby approved this 26th day of October, 1912.

GEO. W. PIERSON,
Judge of said District Court.

Due service of the within bond and receipt of a copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

Filed October 26, 1912. [18]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,
Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,
Defendant.

Order of Removal.

The defendant herein having within the time provided by law filed its petition for removal of the cause to the District Court of the United States, in and for the District of Montana, and having at the same time offered and filed in said action its bond in the sum of two hundred dollars, with W. H. Donovan and L. H. Drake, good and sufficient sureties, pursuant to statute and conditioned according to law; now, therefore, this Court does hereby accept and approve said bond and accept said petition, and does order that this cause and action be and the same hereby is removed for trial to the District Court of the United States, in and for the State of Montana, ..., pursuant to the statute of the United States, and the Clerk of this Court is hereby authorized, ordered and directed to furnish the petitioner, defendant Stone-Ordean-Wells Company, herein, a duly certified copy of the record in this cause, upon the payment of the legal and customary fees for preparing said record. And this Court will proceed no further in said action unless the same shall be remanded from said District Court of the United States.

Done in open court this twenty-eighth day of October, 1912.

GEO. W. PIERSON,
Judge.

Filed Oct. 28, 1912. [19]

[Certificate of Clerk to Record on Removal.]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

State of Montana,
County of Yellowstone,—ss.

I, Lorin T. Jones, Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, do hereby certify that the hereunto annexed papers are full, true and correct copies of the complaint, summons, return on summons, stipulation, demurrer, petition for removal, bond on removal, notice of said petition and bond for removal, and order of removal in the above entitled action, and that said papers constitute the entire record in said cause.

Witness my hand and the seal of my office this 15th day of November, 1912.

[Seal] LORIN T. JONES,
Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

[Endorsed]: Title of Court and Cause. Transcript on Removal. Filed Nov. 18, 1912. Geo. W. Sproule, Clerk. [20]

Thereafter, on January 21, 1913, Answer was duly filed herein, as follows, to wit: [21]

In the District Court of the United States, in and for the District of Montana.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Answer.

Comes now the above-named defendant, and for answer to the complaint of plaintiff filed herein:

1.

Admits the allegations of paragraphs 1, 2 and 3 of said complaint.

2.

Admits the allegations of paragraph 4 of said complaint, except that defendant denies that the platform mentioned in said paragraph was nine feet above the floor or at any greater height from said floor than eight feet; except also that defendant denies that the boards of which said platform was constructed were of uniform width; and defendant alleges that said boards were of various widths from six inches to twelve inches; and except also that defendant denies that defendant had placed a board at the outer edge of said platform, or that the board referred to was only 10 feet long or of the same dimensions as those used in the floor of said platform. Defendant alleges the truth to be that

said board was not a part of said platform, that it was separate therefrom and from three and one-half inches to four inches below said platform; that said board was eleven feet long, about ten inches wide, and placed at right angle to the boards in the floor of said platform.

3.

Denies any knowledge or information sufficient to form [22] a belief as to each or any of the allegations of paragraph 5 of said complaint, except that defendant admits that on the 21st day of June, 1912, while plaintiff was in the employ of defendant, plaintiff went upon said platform to assist another employee in getting certain empty coffee cans, which were crated, from said platform to said first floor, and that while so employed plaintiff fell from said platform to said floor.

4.

Denies each and every allegation of paragraph 6 of said complaint, except that defendant admits that there was no railing along the outer edge of said platform. And defendant alleges that said board was not intended, or placed there, to be stepped, stood or walked upon by any person, as was patent and plainly apparent from the position it occupied and the manner in which it was fastened up; and all of which plaintiff well knew or would have known had he exercised due or reasonable care or diligence or caution, or any care, diligence, or caution whatsoever or at all.

5.

Denies each and all of the allegations of paragraphs 7, 8 and 13 of said complaint.

6.

Denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 9, 10, 11, and 12 of said complaint or as to any of the allegations of any of said paragraphs, 9, 10, 11, and 12.

7.

Admits that the claim for damages set out in said complaint has not been paid, but as to the allegation that plaintiff is now the owner of said claim, defendant denies any knowledge or information thereof sufficient to form a belief.

8.

Further answering and for a first separate defense [23] to the cause of action in said complaint set forth, defendant alleges that each and all of the injuries to plaintiff set forth and alleged in said complaint were due to and occasioned by causes, the risk of injury from which said plaintiff, William A. Hansford, had assumed.

9.

Further answering and for a second separate defense to the cause of action set forth in said complaint, the defendant alleges that each and all of the injuries to said plaintiff set out and alleged in said complaint were due to and caused by his own, said William A. Hansford's, contributing fault and carelessness.

10.

Save as in this answer above specifically admitted or denied, defendant generally denies each and every

allegation and all of the allegations of plaintiff's said complaint.

WHEREFORE, having fully answered, defendant prays judgment for its costs of suit herein.

J. H. JOHNSTON,
Attorney for Defendant.

State of Montana,
County of Yellowstone,—ss.

J. H. Johnston, being first duly sworn, on oath says: That he is the attorney for the defendant named in the foregoing answer, and resides in said Yellowstone County; that said defendant is a corporation, and there is no officer of said defendant corporation within said Yellowstone County, where this affiant resides and this verification is made, and for that reason he makes this verification on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof, and that said answer and the matters and things therein stated are true to the best of his knowledge, information and belief.

J. H. JOHNSTON.

Subscribed and sworn to before me this 20th day of January, 1913.

[Seal] JAS. R. GOSS,
Notary Public for the State of Montana, Residing at Billings, Montana.

My commission expires January 30th, 1915. [24]

Due service of the within answer and receipt of a copy of same acknowledged this 20th day of January, 1913.

NICHOLS & WILSON,
Attorneys for Plff.

[Endorsed]: Title of Court and Cause. Answer. Filed Jan. 21, 1913. Geo. W. Sproule, Clerk. [25]

Thereafter, on January 29, 1913, an Amended Answer was duly filed herein, in the words and figures following, to wit: [26]

In the District Court of the United States, in and for the District of Montana.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY,
a Corporation,

Defendant.

Amended Answer.

Comes now the above-named defendant, and for amended answer to the complaint of plaintiff filed herein:

1.

Admits the allegations of paragraphs 1, 2, and 3 of said complaint.

2.

Admits the allegations of paragraph 4 of said complaint, except that defendant denies that the platform mentioned in said paragraph was nine feet above the floor or at any greater height from said floor than eight feet; except, also, that defendant denies that the boards of which said platform was constructed were of uniform width; and defendant alleges that said boards were of various widths from six inches to twelve inches; and except, also, that defend-

ant denies that defendant had placed a board at the outer edge of said platform, or that the board referred to was only 10 feet long or of the same dimensions as those used in the floor of said platform. Defendant alleges the truth to be that said board was not a part of said platform, that it was separate therefrom and from three and one-half inches to four inches below said platform; that said board was eleven feet long, about ten inches wide, and placed at right angle to the boards in the floor of said platform.

3.

Denies any knowledge or information sufficient to form a belief as to the allegations, or any of the allegations of paragraph 5 of said complaint, except that the defendant admits that on the [27] 21st day of June, 1912, while plaintiff was in the employ of defendant, plaintiff went upon said platform to assist another employee in getting certain empty coffee cans, which were crated, from said platform to said first floor, and that while so employed plaintiff fell from said platform to said floor.

4.

Denies each and every allegation of paragraph 6 of said complaint, except that defendant admits that there was no railing along the outer edge of said platform. And defendant alleges that said board was not intended, or placed there, to be stepped, stood or walked upon by any person, as was patent and plainly apparent from the position it occupies and the manner in which it was fastened up; and all of which the plaintiff well knew, or would have known had he

exercised due or reasonable care or diligence or caution, or any care, diligence, or caution whatsoever or at all.

5.

Denies each and all of the allegations of paragraph 7, 8, and 13 of said complaint.

6.

Denies any knowledge or information sufficient to form a belief as to the allegations, or any of the allegations, of paragraphs 9, 10, 11, and 12 of said complaint.

7.

Admits that the claim for damages set out in said complaint has not been paid, but as to the allegation that plaintiff is now the owner of said claim, defendant denies any knowledge or information thereof sufficient to form a belief.

8.

Save as in this answer above specifically admitted or denied, defendant generally denies each and every allegation and all of the allegations of plaintiff's said complaint.

9.

Further answering and for a first separate defense to the cause of action set out in plaintiff's said complaint, the defendant alleges that each and all of the injuries to said plaintiff set out in said [28] complaint were approximately due to and caused plaintiff's own fault and carelessness, in the following particulars:

That the said board upon which, plaintiff alleges, he stepped and the breaking of which caused his fall

and injuries, was not a part of said platform, and was not intended, or placed there, to be stepped, stood, or walked upon, as was patent and plainly apparent from the position it occupied, the manner in which it was fastened up, and its lack of support; that it was placed there and maintained solely for use as a shelf for the holding of light articles only; that it was not necessary for plaintiff to hand down said coffee can nor to step upon said board in handing it down; that there were other ways or methods of taking or transferring said cans down from said platform to said first floor, which were safe or less dangerous than the way and method selected and used by plaintiff; all of which facts in this paragraph above alleged plaintiff knew, or by the exercise of reasonable or ordinary care or caution would have known. Plaintiff voluntarily chose the method and way in which to take or pass said coffee can down from said platform; a way and method which was dangerous and apparently so. That he knew, or by the exercise of reasonable or ordinary care or caution would have known, that said board would not support his weight; that it was not safe for him to step on it; and that he would be liable to receive a fall and injuries if he stepped thereon. Plaintiff was careless and negligent in choosing the way and method of taking or transferring said can from said platform to said first floor, in handing said can down, and in stepping upon said board, if he did step thereon.

10.

Further answering and for a second separate de-

fense to the cause of action set out in plaintiff's said complaint, the defendant alleges that each and all of the injuries to the plaintiff set out and alleged in said complaint were proximately due to and occasioned by causes, the risk of injury from which said plaintiff had assumed, in this:

1. That plaintiff knew, or by the exercise of reasonable or ordinary care and caution would have known, that said board was a [29] shelf intended to hold light articles only; and not intended to be stepped upon; that said board would not hold his weight, and that if he stepped upon it said board was likely to break and cause him to fall to the floor and be injured thereby; that said board was supported only by being nailed to cleats at each end thereof; that it was not necessary for him to step upon said board in handing said can down, nor to hand said can down, but that there were other and less dangerous, or perfectly safe, methods and ways of transferring said can from the platform to the floor, but nevertheless with such knowledge and appreciation of the risk he stepped upon said board, if he did step upon said board as alleged in said complaint.

2. That said board was intended by defendant to be used solely as a shelf and to hold light articles only, and was not intended by defendant to be stepped, stood or walked upon by any person, and if plaintiff stepped upon same, as alleged in said complaint, he did so without any necessity therefor.

3. That there was no fault, negligence, or carelessness on defendant's part in maintaining said platform without a railing around the outer edge

thereof, or in maintaining said board without other or additional support, in the place it was maintained; and that plaintiff's alleged injuries and loss suffered therefrom, if any, were suffered by him solely in consequence of the ordinary risks of the business in which he was then employed.

WHEREFORE, having fully answered, defendant prays judgment for its costs of suit herein.

J. H. JOHNSTON,
Attorney for Defendant.

State of Montana,
County of Yellowstone,—ss.

J. H. Johnston, being first duly sworn, on oath says: That he is the attorney for the defendant named in the foregoing answer, and resides in said Yellowstone County; that said defendant is a corporation, and there is no officer of said defendant corporation [30] within said Yellowstone County, where this affiant resides and this verification is made; and for that reason he makes this verification on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof, and that said answer and the matters and things therein stated are true to the best of his knowledge, information and belief.

J. H. JOHNSTON.

Subscribed and sworn to before me this 28th day of January, 1913.

[Seal] JAS. R. GOSS,
Notary Public in and for the State of Montana, Residing at Billings.

My commission expires Jan. 30, 1915.

[Endorsed]: Title of Court and Cause. Amended Answer. Filed January 29, 1913. Geo. W. Sproule, Clerk. [31]

Thereafter, on February 6, 1913, Reply to Amended Answer was duly filed herein, in the words and figures following, to wit: [32]

In the District Court of the United States, in and for the District of Montana.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Reply to Answer and Amended Answer.

Comes now the plaintiff in the above-entitled cause and replying to the averments of the answer and amended answer herein states:

I.

That he denies each and every averment contained in paragraphs 8 and 9 of the said answer.

II.

That he specifically denies each and every averment contained in paragraph 9 and paragraph 10 of the amended answer herein, the same being the first and second separate defenses respectively, pleaded by the defendant.

WHEREFORE, plaintiff prays as in his complaint.

NICHOLS & WILSON,
Attorneys for Plaintiff.

State of Montana,
County of Yellowstone,—ss.

William A. Hansford, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has heard the foregoing reply read and knows its contents, and that each of the statements therein contained is true of his personal knowledge.

.....,

Subscribed in my presence and sworn to before me by the said [33] William A. Hansford, this .... day of February, 1913.

.....,

Notary Public for the State of Montana, Residing at Billings, Montana.

My Commission expires November 2, 1913.

[Endorsed]: Title of Court and Cause. Reply. Filed Feb. 6th, 1913. Geo. W. Sproule, Clerk. [34]

Thereafter, on June 6, 1913, the Verdict of the Jury was duly filed and entered herein, in the words and figures following, to wit: [35]

In the District Court of the United States, District of Montana.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, find for the plaintiff, and we assess his recovery in the sum of Five Thousand ($5,000) dollars.

R. E. STONER,
Foreman.

[Endorsed]: Title of Court and Cause. Verdict. Filed June 6, 1913. Geo. W. Sproule, Clerk. [36]

Thereafter, on June 11, 1913, Judgment was duly entered herein, in the words and figures following, to wit: [37]

In the District Court of the United States, District of Montana.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Judgment on Verdict.

Be it remembered that this action came on regularly for trial, the parties hereto appearing by their respective attorneys, plaintiff by Nichols & Wilson, and the defendant by Gunn, Rasch & Hall and J. H. Johnston. A jury was regularly impaneled and sworn to try said action. Thereupon witnesses upon the part of the respective parties were sworn and examined, and, after hearing the evidence, the arguments of counsel and the instructions of the Court, the jury retired to deliberate of their verdict, and subsequently returned into Court with a verdict duly signed by their foreman, by which the issues of said cause were found for the plaintiff, and his recovery was assessed in the sum of Five Thousand ($5,000.00) Dollars.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is now hereby ordered, adjudged and decreed that the plaintiff have and recover of and from the defendant the sum of Five Thousand ($5,000.00) Dollars, with interest thereon at eight (8%) per cent from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action taxed in the sum of Forty-three 60/100 Dollars.

Entered June 11, 1913.

GEO. W. SPROULE,
Clerk. [38]

United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States

District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

WITNESS my hand and the seal of said Court at Billings, Montana, this 11th day of June, A. D., 1913.

GEO. W. SPROULE,
Clerk.

[Endorsed]: Title of Court and Cause. Judgment-roll. Filed and entered June 11, 1913. Geo. W. Sproule, Clerk. [39]

Thereafter, on September 25, 1913, defendant's Bill of Exceptions was duly settled and allowed and filed herein, being in the words and figures following, to wit: [40]

In the District Court of the United States, in and for the District of Montana.

WILLIAM A. HANSFORD,
Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial in said court on the 5th day of June, 1913, before the Honorable George M. Bourquin, the Judge of said Court, and a jury duly impaneled to try said cause, Messrs. Nichols & Wilson appearing as counsel for the plaintiff, and

(Testimony of William A. Hansford.)

Messrs. J. H. Johnston and Gunn, Rasch & Hall, appearing as counsel for the defendant.

And thereupon the following proceedings were had:

[Testimony of William A. Hansford, the Plaintiff, in His Own Behalf.]

WILLIAM A. HANSFORD, called and sworn to testify as a witness in his own behalf, testified as follows:

Direct Examination.

My name is William A. Hansford. I live at Billings and have lived here about three years. Before coming to Billings I resided at Park City, Montana. I am thirty years old, married and have a family. My business is manual labor and have worked in various lines. I worked for a lumber company here in Billings and worked for Stone-Ordean-Wells Company. While living at Park City my business was plaster and lather. I entered the employ of the Stone-Ordean-Wells Company on June 1, 1912, and was employed in shipping goods, and receiving goods and getting [41] them ready for shipment. When any goods came in and went on my floor I had to stack them up in an orderly manner. If there were orders to go out I had to wheel them out on the platform. I had no special place to work in their building. It was understood that I should do most of my work on the first floor. The building was located on 5th Avenue and 25th Street. There were three floors in the building and the person in charge of my floor, supervising the work was Mr. Russell. He was

(Testimony of William A. Hansford.)

shipping clerk and I always worked under him as foreman. He gave me the orders to do the things which I did. I did some things Mr. McDonough told me to do; he was the manager. I did work on other floors at the direction of Mr. Russell and Mr. McDonough. I ceased my employ on the 21st day of June, 1912. With reference to the first floor, the goods that were received into the building were placed in various places in the building. There were certain places to put the sugar, certain place to put the salt and a certain place to put tobacco. There was a platform on this first floor raised above the floor itself. It was in the northwest corner and was possibly thirty feet one way and twenty the other. It was about eight or nine feet above the floor, was used for the storing of merchandise on it, spices, clothespins, lamp chimneys and lantern globes. The means of access to the platform was a ladder located on the east end of the platform. The model before us here looks similar to the one in the building, except the ladder there was perpendicular.

On the day in question I had an order which called for empty coffee cans and it was about three o'clock when we were filling this order. Mr. Russell was with me at the time. I had a conversation with Mr. Russell with reference to this part of the order; there was something said about it. There was something said about the weight of the cans. I believe that I said they would not weigh one hundred pounds, and Mr. Russell said we would ship them anyhow. That

(Testimony of William A. Hansford.)

is about as near the [42*—2†] conversation as I can remember. Mr. Russell told me to go up and get them down. These coffee cans were on this platform. I had been on this platform before, possibly fifteen or twenty times. Ihad not haad occasion before this time to go up to hand anything down to anyone. As to how I would get down the goods which I had previously gotten up there, if light stuff, carry them down the ladder. Other times somebody would catch them below, pitch them down. As to the character of the goods on this platform, compared to the other goods, they were small packages and light, most of it. The empty coffee can which you hold in your hand is such a package as I have reference to. It would be a fair representation. The weight of those cans is about fifteen pounds, I believe. If I remember right, there were six of them to be secured in filling that order that day. In response to Mr. Russell's directions, I went up and started to hand down and give the cans to Mr. Russell. I went up this ladder. As to what I did in handing down the cans to Mr. Russell, I just simply took hold of the top, stoop over and handed them over the edge to Mr. Russell and he would take them from me, take them with both hands. I would say that these cans were located about three or four feet back on the platform from the edge of it. Mr. Russell was on the floor below, just at the edge of the platform about one-third of the way from the post.

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*Page-number of Original Certified Transcript of Record.

†Original page-number of Bill of Exceptions as same appears in Original Certified Transcript of Record.

(Testimony of William A. Hansford.)

He was standing in front of the platform, to the center of the platform between these two posts (referring to model of platform). After I took hold of this can, I went to the edge of the platform with it, leaned over, and handed it over to Mr. Russell. I could not tell you how far down I would lean. I could not say for sure how many of these cans I actually did hand to Mr. Russell; my best recollection is two or three. Assuming that I had handed down two of them, when I handed or attempted to hand down the third can I lit on the floor; the board broke. I fell on my right side, at Mr. Russell's feet, right at his [43—3] feet. With reference to the broken board, five—four or five—possibly six feet from this post here (indicating post on model). I was not unconscious, I noticed the board hanging there. When I observed the broken board it was not detached entirely from the platform; it was hanging to the cleats at either end.

After I fell, they got me some water and gave me a drink, put my arm in a sling, a sugar sack, and helped me on my feet. I went to the office of Dr. Walters and found that my right elbow was broken. My chest was also injured and that is all that I know of. Dr. Walters called in another doctor and put my arm in a sling. Wrapped it up and put it in a sling; put on splints. I was suffering the greatest kind of pains at that time, as severe as it possibly could be. I was under the care and treatment of Dr. Walters practically two months, I guess. My arm was put in a partial cast, and after my arm was taken

(Testimony of William A. Hansford.)

from this cast I could not use it at all. I had no motion in the arm at the elbow, and the condition of the wrist was weak,—dropped down like that (illustrating). I had no rotary motion of the arm at that time. The character of the other injuries that I spoke of, my chest was all black and blue and sore. There were no broken bones that I know of. My chest remained in that condition may be for a month or two. Once in a while it hurts me still if I cough violently or sneeze or anything like that.

After Dr. Walters had treated me for this length of time I went for treatment to Doctors Rieger & Rieger, osteopaths. Dr. Walters told me to massage the arm, and I had the osteopaths do that. I must have been under their treatment a month. I was not able to secure any motion, any movement in the elbow at that ime. Dr. Movius also treated my arm and performed an operation upon it. I had the bones wired together, and several other things done to it; I don't know exactly. That was in October. The result of this operation gave me motion, rotary [44—4] motion, this way (indicating). There is a slight movement now in the elbow joint—this much (witness exhibiting the injured arm to the jury). It had not yet fully healed up. I have continuous pain since it was first treated by Dr. Walters up to the present time. It pains me all the time. I am able to use it just from the shoulder. I can do very little with it, if anything. As to what I had tried to do with it, I have worked in a drug-store a short while. I am not able to lift anything with any weight, not

(Testimony of William A. Hansford.)

to hold it out. I can lift a weight straight out, possibly forty or fifty pounds. I was right-handed and as to whether I am able to use my arm in writing, I can use it a very little by getting the proper position. I still have the use of my fingers but I am not able to feed myself at all with that hand.

Q. Referring again, Mr. Hansford, to the platform and a matter to which I intended to call your attention: You had been working about this place for about three weeks, as I understand you?

A. Yes, sir.

Q. Did you, prior to the day that you went upon the platform, had you observed that there was a board as indicated here (referring to model) which was not a part of the platform itself? A. I had not.

Q. Had you observed that there was a board, or a part of the platform which was only supported by a couple of little cleats at either end? A. I had not.

Q. As you were working about on the platform—on the floor below, had you observed that there was a board at the edge of the platform which was not in fact a continuation of the platform?

A. I never had. [45—5]

Q. What appearance, if any, as you recollect, did this platform give—that is to say, was there any indication that there was any portion of it there which wasn't in fact a part of the platform?

A. I never noticed it.

Q. Now, as you went upon the platform that day and as you turned to take these cans and leaned over to hand them down to Russell, did you at that time

(Testimony of William A. Hansford.)

observe that there was a board at the edge of the platform which was not a part of the platform?

A. I did not.

Q. And had you, in handing down the previous cans, observed that you had stepped upon a board which was not in fact a part of the platform?

A. I had not.

Q. Had anybody said anything to you with reference to this platform or this board, about the building there? A. No, sir.

Q. Either Mr. Russell or anybody else?

A. No, sir.

Q. Who had anything to do with the business or in fact had anybody ever called your attention to it?

A. No, sir.

While I was working for Stone-Ordean-Wells Company I was getting $2.50 per day, besides overtime when we worked at night. I am sure I could not say how much I was averaging a month; we worked over there every night while I was there. My average wages per month were in the neighborhood of $70 to $75. When I was working at Cardell's Lumber Company I made about $90 per month. Since this injury I have not been able to do any manual labor. I have been working in a drug-store since Christmas and get $12 per week, for seven days' work. I have not a [46—6] permanent position there and have no provision outside of my ability to earn by manual labor.

Cross-examination.

I stated that it was understood that my particular

(Testimony of William A. Hansford.)

work was to be on the first floor, and with reference to the platform, the first floor of the building was located just the same as if that table was the first floor. It was the floor just underneath the platform. The platform extends practically to the west wall of the building and the distance from the west end of the building, the west wall of the building, to the east end of the platform was approximately, I would presume between 25 and 30 feet. There is a door in the west wall of the building and there are also doors in the east end of the building, and there is a passageway extending from one end of the building to the other, right in front of this platform. As the goods were being moved from the building or into the building this passageway in front of the platform was made use of to handle the goods. It was about three o'clock in the afternoon on the 21st day of June last when the accident occurred. The doors were open and it was light in the building. The work which I did during the twenty-one days that I was employed there consisted of loading salt, sugar—wheeling salt, sugar, etc., out on the platform. The platform that I had refernce to is the shipping platform on the outside of the building. Most of that work was done on the first floor. The shipping platform was at the west end of the building. In handling supplies or goods for shipping purposes, or taking goods into the building, we would sometimes take them along this passageway. If unloading cars we would take them in from the side doors. In the disposition of goods as they came in I never had had occasion to put them on

(Testimony of William A. Hansford.)

this platform, but in preparing for shipment I had had occasion to take goods or packages from this platform. I could not say [47—7] how frequently. I possibly was up there fifteen or twenty times while I worked there. It is not a fact that my duties called me on to this platform many times a day. It is not a fact that a great many goods were stored there from time to time and taken off from time to time. The occasions that called me to the platform, the fifteen or twenty times that I have stated when I was employed there, were always in connection with setting goods and taking them down to the first floor. As to how I would bring them down, I tossed most of them over the edge, anywhere along this platform. I might have taken some goods down by carrying them down the ladder, but I have now no recollection that I ever did so. The methods that I observed and that I used in disposing of the goods from the platform to the first floor was by tossing them over the platform to someone on the first floor. I have no recollection of ever having taken down goods or merchandise from the platform than in passing them down to persons standing below.

These coffee cans that were being taken down that day were light, but they were too bulky to toss them down instead of handing them down to Mr. Russell below. I never saw them tossed down.

The height of the platform above the level of the first floor is eight or nine feet. I have not measured it so as to give definitely the exact distance between the first floor and the floor of the platform. In mov-

(Testimony of William A. Hansford.)

ing goods from one end of the building to the other and distributing the goods in the building on the first floor, the floor of this platform and this board were some distance above my head.

Q. And there was no difficulty in you observing how this platform was arranged—how it had been constructed and how the boards were lying there?

A. I never paid any attention to it.

Q. And it was high enough and light enough so if you had [48—8] paid attention and looked at the platform to see how it was constructed that you could have seen it, how it was supported and how the board was fastened there?

A. I presume, if I had made an inspection I could have told it.

Q. Now, this board was in the same position that it was in at the time of the accident, when you first went to work there on the first day of June was it not Mr. Hansford?

A. You mean—

Q. You had observed that board there a number of times as you were moving along the floor?

A. I had not.

Q. Had never noticed this board?

A. Never noticed it.

Q. It was fastened, was it not, or was resting upon a couple of cleats that had been attached to the uprights?

A. It was.

Q. You noticed that? A. After I was hurt.

Q. You never noticed it before? A. No, sir.

(Testimony of William A. Hansford.)

Q. If you had looked in that direction at any time you would have seen it, would you not?

A. I suppose a person could.

I don't remember what use was made of this board when I first went to work for Stone-Ordean-Wells Company. As to whether I remember of anything being on this board, resting on this board, when I entered the employ of Stone-Ordean-Wells Company, I paid no attention to it.

Q. Didn't you notice the board there at that time or some time after when you went into their employ?

A. I did not.

Q. Didn't you observe what use was made of the board when you first went to work for the company?

[49—9] A. I did not.

Q. Isn't it a fact that at that time there were some spices placed upon this board?

A. I don't know.

Underneath this platform and about four or five feet from the passageway and the edge of the platform were the scales and there were some shelves around in the apartment where the scales were. As to the use that was made of the shelving that was in this apartment where the scales were located, I believe that had spices and a few goods like that in there. I don't know that this board that was up above, resting on the cleats, was made use of for the same purpose, in putting spices on that board. I have no recollection as to ever having seen any spices or any like goods put on that board. It is not a fact that after I went into the employ of the company I and

(Testimony of William A. Hansford.)

Mr. Russell removed the spices that had been placed upon this shelf. It is a fact that I helped remove some of the goods and spices that had been stored on the shelves in this apartment in which the scales were located. As to how long after I commenced working there it was when I helped to remove the merchandise from the shelves in this apartment where the scales were located, I presume two or three days—a day or so. As to how long before the time of the injury this shelving and the merchandise that had been kept there was removed from this apartment, I presume it was about two weeks and a half.

As to the portion of the platform where I was employed when I had occasion to throw down goods and merchandise, it depended on where the goods were located. There were goods on most of the platform and would toss the goods from the platform from the east and west end but most of them were tossed over at the west end.

As to whether the floor of the platform consisted of [50—10] boards extending in a northerly and easterly direction, I never paid any attention to that. I have no recollection now as to how the boards were laid. The board that was below the platform between the uprights was lying east and west. As to whether I noticed that before the time of the accident, I never noticed the board. As to whether I had paid any attention to my surrounding there and taken a look at the way the floor of the platform was constructed and the position of these boards, I do not know as I would have seen it at a glance. If I had

(Testimony of William A. Hansford.)

gone there purposely and examined it I would have. These coffee cans that I was handing down to Mr. Russell that afternoon were located upon the platform close to the center upright and they were possibly three or four feet back from the edge of the platform. At the time the board broke I had handed down some of the cans, and the way in which I handed them down, I picked them up with both hands, stepped to the edge, leaned over and handed them down to Mr. Russell.

Q. And which have you reference to, the edge of the platform or the edge of the board?

A. I stepped to the edge and handed them over.

Q. Yes, but in stepping to the edge of the board you naturally would have to step about three or four inches lower to reach the board than you would by remaining on the platform, would you not?

A. I guess it is that much lower.

Q. Do you remember whether you remained on the platform in handing down the first two or three cans or stepped down on the board.

A. I do not.

Q. Don't you remember? A. No, sir.

Q. So that as far as you now recall, the first two or three cans might have been handed down to Mr. Russell standing below without stepping on the board at all? [51—11]

A. I could not say as to that.

As to how this matter came up of getting the cans and what the conversation was I had with Mr. Russell and who first made reference to the cans, whether I

(Testimony of William A. Hansford.)

or Mr. Russell, I don't remember who mentioned it first. I don't remember how the talk came up at all. I had been wheeling goods out on the shipping platform just prior to the time I went to the platform to get these cans. As to how I happened to go on to the platform to get these cans, I was ordered there by Mr. Russell.

Q. I wish you would tell us what he said in that regard?

A. He said, "Go up and get me down—go up and hand me down those cans."

Q. Then you don't know the conversation with reference to the cans preceding the order that came from Mr. Russell?

A. There was some conversation about the weight of them or something that was. I don't remember the exact words of it.

Q. He then told you to go up on the platform and hand down the cans to him?

A. Yes, sir.

Q. Is that all that was said by Mr. Russell?

A. That is all I remember of.

I went up on the platform and handed the cans down. I could not tell you how far this board extended beyond the edge of the platform. You may understand me to say that I had never observed this board there and had never observed the condition that existed there prior to the time that the board broke with me, and had never observed that there was a space of about three or four inches between the edge of the surface of the floor of the platform and the sur-

(Testimony of William A. Hansford.)

face of the board as it extended between the two uprights. As to whether it isn't a fact that on frequent occasions I had been engaged during the time I was employed there handing down merchandise, boxes and articles from [52—12] the east end of the platform the same place where I was working that afternoon to a person standing below just as I was doing that afternoon, not that I remember of. I don't remember of having done that very thing with Mr. McDonough. I going to the platform and getting the cans of goods and handing them over to him. Nor have I any recollection of ever having done so with Mr. Russell. I have no recollection of standing on the first floor of the building and someone else on the platform handing down goods to me below. I have stood down on the first floor and a person on the platform tossing them down to me. As to whether that was done frequently, I cannot tell you the number of times when I was standing down on the floor and someone on the platform would toss the goods down to me. I recall having stuff tossed down to me, but I have no recollection as to the number of times that was done. In doing that kind of work as the things came down, a person would have to bend his head back in catching the goods as they came down, and one's vision would be on the article they were tossing to him. As to whether in waiting and looking for the article one's vision and sight would be in the direction of this board, a person would naturally have to look up.

Q. But during all this time you never noticed the

(Testimony of William A. Hansford.)

way that this board was located there?

A. Never did.

Q. Never noticed that it wasn't a part of the platform?

A. Never did.

Q. Never noticed that it was from three to four inches below the edge of the platform?

A. Never did.

I had a talk with Mr. Johnston at my house last July, telling him how the accident occurred. At that time I made a statement of the facts and he noted it down and had it [53—13] written out and submitted the statement to me for reading. I did not tell him that the facts as therein given were correct.

Q. Isn't it a fact that you told him that the facts as stated in the statement he had written down were correctly stated and that before signing it you wanted to see your attorneys?

A. I don't know as I did tell him that.

Q. Have you no recollection about that?

A. No, sir.

Q. Have you any recollection now as to what you did tell him at the time? A. No.

Q. You, however, refused to sign the statement at that time? A. I did.

Q. Never did sign it afterwards?

A. No, sir.

Q. Did you tell Mr. Johnston then, anything as to whether the statement was correct or not?

A. I didn't talk very much to Mr. Johnston about it.

(Testimony of William A. Hansford.)

Q. Made no comment one way or the other?

A. No, sir.

As to whether this paper which you have handed me is not the paper Mr. Johnston handed me to read which he had taken down at the time he talked with me about the case or about the accident, I believe it is something similar. I did not after reading the statement call Mr. Johnston's attention to any portion of it that was not correct. I didn't tell him with reference to going on the platform that I went on the platform at my own suggestion to hand down the cans. I made no such statement or statements in substance to that effect. I believe I did state to Mr. Johnston at that time that there was in front of the platform and about four inches lower than the platform an inch board, twelve inches wide, which was nailed to cleats on the upright posts or pillars not otherwise supported, but that I didn't know that this board was not safe and not otherwise [54—14] supported. I didn't make the statement to him that in handing the first two or three cans down to Mr. Russell below I stepped down on the board there with one foot or both feet while I was doing that.

Redirect Examination.

The side door through which a portion of the goods were brought in was on the south side of the building. There is a delivery track for carload goods—cars to stand on running along the side of this building. There are three or four side doors on the south side of the building, and those are the doors I referred to as side doors. The delivery platform was on the west

(Testimony of William A. Hansford.)

end. Three or four days after my injury I returned to the building to get my pay. I went out in the warehouse to make some observations. I saw the board at that time and observed how it had been held up. It had no other support than the cleats on the uprights at either end.

With reference to the visit made by Mr. Johnston, that was Mr. J. H. Johnston, one of the attorneys here for the defendant. I was at home at the time this visit was made and it was made sometime the first day of July. The reason he gave for asking for a statement from me was so that they might effect a settlement. The conversation I had with Mr. Johnston was in the form of questions and answers. He asked the questions and replied to some questions that were made. He made some memoranda on a paper and very short time, a few days, afterwards, this paper here that has been shown to me was presented to me. I read it over at the time it was presented to me, but not much of anything was said about it. There was no request made of me in reference to it, nor to sign it. I never did sign it. Nothing more was said about the matter at that time nor was anything said as to why I didn't want to sign it, nor was I called on afterwards to sign it. As to **[55—15]** what my condition was at the time with reference to suffering to any extent of Mr. Johnston's visit, my arm was swollen to two or three times its normal size and I was suffering considerably, mentally and physically.

(Testimony of William A. Hansford.)

Recross-examination.

I stated that Mr. Johnston came to get a statement from me for the purpose of seeing whether a settlement could be made. He stated that he wanted to get a statement so he could report to headquarters. I do not remember what else he might have said. As to whether he said anything about settlement at all, he has mentioned it, but I don't know whether it was the day he came to get the statement or not. I believe it was sometime in July when he spoke to me about settlement, but I could not tell whether it was before or after this statement had been taken.

(Examination by the Court.)

These cans that I was handing down were empty, they were all handed down where that board is below the level of the platform. As to whether when I came out and leaned over I stepped out on the board or stepped out the edge of the platform, I do not remember if I was on the board or not while the first cans were handed down. I guess that I was on the board when it broke with me.

Q. Well, do you know?

A. I could not say for sure.

The board was from three and a half to four inches lower than the level of the platform. I do not remember any offset as one would go there and step down. There was no light overhead, but there was light on the west end. It threw the light over the platform through the window and I believe part of the window is above the platform about half a win-

(Testimony of William A. Hansford.)

dow on the west end. As to what was in front of me as I was facing out to [56—16] let the cans down there is a pathway there and the doors were open at the west end and the door was open on the south side. As to what I observed as I looked to let these cans down in the way of an offset in the front of the platform, I did not observe any. I presume that board was about ten or twelve inches wide.

Recross-examination.

There was a side door to the south and I was practically facing this door as I was standing on the platform handing down these cans.

[Testimony of John W. Chaddick, for Plaintiff.]

JOHN W. CHADDICK, a witness called on behalf of the plaintiff, testified as follows:

Direct Examination.

My name is John W. Chaddick and at present I am keeping books for the Billings Electric Supply Company. I was in the employ of the Stone-Ordean-Wells Company in June and previous to June, 1912. I had been with them about twenty-two months. I remember of a platform on the first floor of their warehouse and I remember when the board was put up there between these two upright posts. As near as I can figure that was done somewhere along about February or March, 1912. After the board had been put up there whole cartons of spices, bulk spices, were put upon this board and they remained there probably five or six weeks, I think. I remember when Mr. Hansford came to work there

(Testimony of John W. Chaddick.)

and those spices had been removed prior to his coming there. I helped to take them down myself, and the occasion of their being taken down, the board had gotten weak from the weight of the spices and sagged down. After the spices were put up there I put some supports under the center, and if I remember right these supports were jerked off after the spices were taken down. The support that this board had at either end, I think it was two by four, or something of the kind, spiked to these uprights, those large timbers that run up there. **[57—17]**

I left the employ of the company on the 15th of June and as far as I remember at the time when I left this board was in the same condition which I have described. As to any directions given to put the board up there, if I remember right, I made the suggestion of putting the shelf up and putting these old cartons of old spices up out of the way and Mr. Russell he sanctioned the suggestion. He said, "Go ahead and put the board up there." That might not be exactly the words but that was the substance of it. In passing by this board on the floor below, unless a person absolutely knew they would take it to be originally a part of the platform. That is the way they would take it.

Cross-examination.

I think the board was put there at my suggestion for the purpose of putting these spices on it, and up to the time that a portion of the articles were removed on account of the sagging of the board the

(Testimony of John W. Chaddick.)

entire board was used as a shelf for these spices. The spices were all removed at the same time. I am not sure as to the time when this removal took place but I think it was before Mr. Hansford went to work. Could not say for sure how long before, but in the neighborhood of two or three weeks any way and perhaps longer. As to whether after the spices had been removed the board remained in this sagged position. I tried to boost the board back to the original position, but if I remember right the cleats were jerked off at that time. I do not remember whether the board sagged a little or whether it was practically straight—I could not say as to that. It is not a fact that only a portion of the spices were removed from the center of the board—they were all removed. As to the condition of this apartment under the platform and whether there was any shelving there, there was shelving plumb around the scales. There were shelves in that entire apartment for the spices awaiting the preparation and getting ready of the spice-room. Part of the spices which had been on shelves under the platform were [58—18] removed a day or two before Hansford started to work, and they still continued on to remove for a few days after he came there. The stuff was being moved at the time he came there. All had been removed to the spice-room before I left their employ, and there were no spices left on the board or underneath the platform at the time I left there.

I had been up on top of this platform for the pur-

(Testimony of John W. Chaddick.)

pose of handing down articles of merchandise. I was in the courtroom this morning while Mr. Hansford gave his testimony and the manner in which he stated that the goods were handed in removing them from the platform was about the way it was done. When the goods were light we would toss them down and when they were too heavy to toss, we would lift them down—kind of scoot them off over the side if too heavy to toss over. I knew the condition of the board and knew it was lower. Of course, I knew the board was there, put it there and knew the conditions of the board, otherwise I might have put my foot on the board.

Q. Aside from the knowledge of the fact that the board was lower than the platform you had no difficulty, had you, in seeing that the board was some lower than the floor of the platform?

A. Sure, I had no difficulty in seeing it or anythink like that.

Redirect Examination.

If I would have been in Mr. Hansford's place, knowing no more than he did about it, nine out of ten, or ninety-nine out of one hundred, I would have put my foot on the board.

Recross-examination.

I know nothing as to the extent of Mr. Hansford's knowledge with reference to the position of that board. I was in the basement from the time Mr. Hansford came there until I left.

Q. You don't mean to say—you didn't mean to

(Testimony of John W. Chaddick.)

say, do you, [59—19] that anyone standing upon this board could not have noticed the difference in the height or surface of this board and the height or surface of this platform?

A. Sure they could have noticed the difference.

[Testimony of Dr. A. J. Movius, for Plaintiff.]

Dr. A. J. Movius, called and sworn as a witness on behalf of the plaintiff, testified as follows:

My name is Arthur J. Movius; my profession is physician and surgeon, and I have been engaged in the practice of medicine and surgery nine years. I have been in Billings two years; know Mr. Hansford and treated him during the year 1912 for his injury. Saw him first about the middle of August, I believe, and there was a fracture dislocation in the elbow joint of his right arm. There was no motion in the arm that he could perform for himself. By applying force, it could be moved an inch or two, perhaps. He had no wrist motion at that time. I operated upon the arm and found a fracture dislocation. The head of the radius was fractured in three pieces There was a forward dislocation of the lower end of the upper arm and the point of the elbow was fractured off and out of the joint where it should be. At the operation two of the fractured pieces of the bone were removed. From the head of the radius and the broken piece of bone that forms the point of the elbow was wired back on to its member and removed the two pieces of the bone from the head of the radius, and restored some of the motion

(Testimony of Dr. A. J. Movius.)

this way. At the present time the elbow has about three or four inches active motion and the injury as it is now is a permanent one. As to what may be expected in the way of improvement, the amount of improvement will not be much unless further operative procedure is gone through and then we cannot promise anything. The arm causes pain and suffering in its present condition, and there is a reasonable probability that it will last for some time. You cannot say how long because of the nature of the injury. I took an X-ray picture of his elbow and have them with me. (Witness [60—20] producing X-ray plates.)

X-ray plates offered and admitted in evidence as Plaintiff's Exhibits 1, 2 and 3, and it was agreed that the American Tables of Mortality show the expectancy of life of thirty years to be thirty-five and thirty-three hundredths years.

Plaintiff rests.

[Testimony of Thomas J. McDonough, for Defendant.]

THOMAS J. McDONOUGH, a witness called and sworn in behalf of the defendant, testified as follows:

My name is Thomas J. McDonough; reside at Billings, Montana, and am the manager of the Stone-Ordean-Wells Company here in Billings. I have held that position three years and nine months and was manager on the 21st of June, 1912. Am acquainted with the plaintiff; he worked for our com-

(Testimony of Thomas J. McDonough.)

pany during the month of June, 1912. The model which has been exhibited here is a fair representation of the platform with reference to which testimony has been given. The platform was constructed in the month of August, 1911, and was put in for the purpose of storing on it light merchandise, such as boxes of clothes-pins, paper-cutters, empty coffee cans and different kinds of light material in the grocery line. I remember about the time when this board was put in between these uprights. The purpose of putting up that board was to serve as a shelf for holding some of these bulk spices. We had no apartment there to keep the spices at the time the board was put up but just a temporary spice-room built under the platform where the scales were. That is the place underneath the platform between the two uprights extending backwards. The arrangement made under the platform for the storing of spices was shelving, and we retained the spices in that locality approximately eight months, until the room or apartment for the storing of the spices had been completed upstairs. This board or shelf was never intended to be used nor was it used for any other purpose [61—21] than as a shelf for the storing of the spices and other articles of merchandise such as could be placed there. It was used for the storing of spices, at the time the plaintiff went into our employ, these spices had not been removed. With reference to the spices that were shelved under the platform they had not been removed at the time

(Testimony of Thomas J. McDonough.)

Mr. Hansford entered our employ, not to my knowledge. I think it was about a week after he entered our employ that we finally cleared out the spices underneath the platform. As to whether the spices had been removed from the board at the time Mr. Hansford entered our employ, that I could not answer. I don't know whether the spices were on that shelf at that time or not. I don't remember. I am quite sure these spices on the board and the spices that were stored underneath the platform were all removed about the same time. The size of the platform is about as has been stated, thirty feet in length and twenty feet wide and extends from the west wall of the building about one-third of the way up the length of the building. There is a large shipping door at the west end of the platform which is our main door getting into the house and out of it. Besides, there is a window over the door in the west wall of the building right in the center of the building. The edge of the platform comes right up to the north edge of the door opening. It is a double sliding door, and when open there is a space eight feet in width and eleven feet in height. There is a window over the door and the side of the window is about five by five feet. As to the openings on the south side of the building, there are three doors, they are smaller than the one that opens on the west end. There are no windows on the south side of the building. There are doors and windows on the east end of the building, and at the time of the accident the

(Testimony of Thomas J. McDonough.)

doors were all wide open. It is very light in that part of the building where this platform is located. I had frequent occasion to be in the vicinity of this platform during the time that this board [62—22] was attached between the two uprights at the east end of the platform and it could be very easily observed that the board was not on the same level with the floor of the platform. During the time that Mr. Hansford was working there I was frequently off and on the platform for the purpose of putting down merchandise and taking some up. I have done that work myself at times. It was very readily observable to anyone standing on the platform that the board was not on the same level with the floor of the platform. This was observable as well from the floor below. I am quite sure that I have had occasion to take goods or merchandise from the platform and hand them down when Mr. Hansford was standing below and handing them down to me. The distance from the floor of the building up to the floor of the platform is about eight feet. As to the kind of a day it was on which this accident happened, it was a very hot, sunshiny day. I never noticed anybody in my employ engaged in that kind of work in taking down goods from the platform and handing them down to the one standing down below use this board as a foot rest to step upon in handing down the goods. The principal part of the work done by our employees and of the plaintiff particularly during the time he was employed by us is down at the west end in front

(Testimony of Thomas J. McDonough.)

of this platform. They have to go back and forth through there probably one hundred times a day. The scale is right under this platform and the distance from the edge of the platform back to where the scales stand is four feet.

Cross-examination.

I have been in the employ of this company as general manager for three years and eight months and have the general supervision of all the work at this point. I have assistance in the office and it is my custom to actually engage in handling merchandise. I also look after the office work but not all of it. As to what portion of my time I would spend out there [63—23] handling merchandise, that would be hard to determine, just the exact proportion of my time. The handling of the merchandise is a portion of the business that has to be looked after and I get out there and work myself with the men. It is not only when there is no sufficient assistance out there to get the work out when I go out to help, I go out every day and work some on the floor. I could not remember now if my attention was called to it specifically the various articles which I have helped others handle. There was nothing particular about the merchandise which I assisted Hansford in handling which fixed it in my mind other than the same would be put in there. There was nothing special about it. I have a distinct clear recollection of assisting Hansford in his work out there in handling merchandise, both on the platform and

(Testimony of Thomas J. McDonough.)

down below at different times as the occasion might happen. I mean to say that I have stood down below and have had Hansford hand down articles to me. I remember that, but I could not remember the character of the goods nor could I remember the days it was. I could not remember where I stood and where he stood, not right at the exact spot. As to whether I remember whether it was handed down or tossed down, it was both. I knew this board was there, but did not know how it had been constructed. I had not personally told these men that it was a dangerous situation and to take these spices off there. I never told them anything about it being up there. My recollection is clear as to the condition of that board —the condition that board was in and the stuff up there. There was never anything in the condition about the weight on this board which occasioned the removal of the stuff from it, no occasion that ever had me tell any men to remove anything from it. I didn't observe that the weight upon this board was sagging it down and leaning over there. I was not present when the board was put up there. My attention was called to it the first time I came out on the floor, I noticed it. As to whether I examined to see how it was put up, [64—24] I looked and saw it was a shelf put up. A temporary shelf, because they were putting up lots of temporary shelving at that time. I don't remember the exact date when this stuff was taken off of this shelf. Mr. Hansford was in the employ of the company at the time the

(Testimony of Thomas J. McDonough.)

spices were removed from down below, and I think Mr. Hansford was there when they were removed from the shelf. As to the removal of the goods from the shelf, I have no recollection about it other than those spices, to the best of my recollection were all moved about the same time. Some of the spices down below were moved after Mr. Hansford joined forces with us.

[Testimony of Cass. G. Russell, for Defendant.]

CASS. G. RUSSELL, called and sworn as a witness on behalf of the defendant, testified as follows:

My name is Cass. G. Russell; live at Vancouver, Washington, and am twenty-one years of age. My parents are living here in Billings; my father is in business here, the Russell Lumber Yards. I have been in the employ of the defendant company. The last time I was employed was from about the first of March, 1911, to the 28th day of December, 1912. I was in the employ of the company during the month of June, 1912, as shipping clerk, and was doing my work in the west end of the building where this platform is located. I am acquainted with the plaintiff, Mr. Hansford; he worked there during the time I was shipping clerk. I do not remember the exact month when this board was put between these two uprights in front of the platform, that it was there in February or March, 1912. It was put up there for the purpose of holding the bulk spices we had in there. We had no other room to place them without having the spices distributed all over the house, so

(Testimony of Cass. G. Russell.)

the board was put up there to hold all bulk spices. It was never used for any other purpose. I remember the occasion of this accident that befell Mr. Hansford and I am the person to whom the coffee cans were handed. As to how it came about these cans were handled, it was the last order during the day. We were [65—25] just about through, about three o'clock. It was the last consignment of goods going to different parties and this was a Stone-Ordean-Wells Company order to put up to ship to them. I looked at the order and read it off and there were a certain number of coffee cans to go back to the home house, and I noticed they were below shipping weight. The shipping weight is 135 pounds, that is, the minimum. If you ship less than 135 pounds they would charge you the same as if they were for 135 pounds. I went in the office to see whether I should ship it or not and I got the orders to ship them and I came out and told Mr. Hansford that we would ship the cans. Mr. Hansford then said he would go up on the platform and get the cans. I was in the courtroom this morning when Mr. Hansford testified and heard him state that I ordered him to go on the platform and hand the cans down to me, but I did not order him. As to what happened after that, while he was going up, I got the truck ready to receive them. He handed down three of these cans and I put them on the truck and labeled them and put them on the platform, and when I turned around to push the truck away from me to

(Testimony of Cass. G. Russell.)

make room, and when I was doing that he fell. The elevation of this platform above the floor of the building is eight feet and one and a half inches.

I observed Mr. Hansford as he handed down the first two or three of the cans to me from the platform. I had to lean back or bend back my head for the purpose of taking hold the cans as they were handed down to me. In handing down the first two or three cans Mr. Hansford was standing on the platform itself. As to whether there was anything to prevent the plaintiff handing down the cans to me from the platform west of the uprights instead of handing them down to me east of the uprights there were things on the west of it, but there was a six foot clear space from which he could have handed them down. A six foot clear space from the uprights over towards the wall. As to how [66—26] we happened to do the work of taking these cans down east of the uprights rather than to the west of the uprights, I took my position according to Mr. Hansford as he started handing them down. I got my truck ready there at the door at the west end of the building, came back to the platform, and Mr. Hansford was standing there waiting to hand me down the cans, and I got my truck in a position to receive it. I should judge it was about two feet east of the upright where Mr. Hansford was standing. I never saw anybody make use of this board in handing down goods as a foot-rest or place to stand on in lifting articles of merchandise from the platform

(Testimony of Cass. G. Russell.)

down to a person below on the first floor to receive them. The board was put there to put bulk spices on.

The spices were finally removed from the board about the first week Mr. Hansford was there, a portion of them had been removed at the center but all of them were not. I have no recollection as to how much of the stuff that had been on the board remained there at the time Mr. Hansford went to work for the company, but I should say about one hundred pounds. They were at both ends and scattered out and not placed at any one spot. I removed the spices from that board that remained there at the time Mr. Hansford went to work, I removed them myself, tossing them to Mr. Hansford who was there down below, when we were removing them to the spice-room. Mr. Hansford assisted me in removing the spices; he was on the floor and I was on the platform.

I heard the testimony of Mr. McDonough as to the conditions that existed there with reference to the door and lights, and the conditions are exactly as he stated. It is lighter in that portion of the building than in any other part, and anyone standing on the floor below could easily see that this was a board put up there resting upon cleats fastened on the uprights, and that it was not on the level with the level of the floor of the platform. As to the opportunity of a man on top of [67—27] the platform to see that the board was lower than the platform and was not a part of the platform, he has a

(Testimony of Cass. G. Russell.)

better opportunity above than he has below. During the time that Mr. Hansford was working there I did not observe him handing down anything from the platform other than this time of the accident, but I have seen him tossing goods down. In fact, he has tossed things to me, but I never saw him handing anything down. I have seen him standing below while someone else was handing or tossing things down to him, and as to how frequently that occurred during the time he worked there, I should say at least ten times a day anyway. As to the frequency that a person had to go on the platform there during the day to get goods or to store goods there, or to get goods for shipment, at least fifteen or twenty times a day.

I stated that that portion of the building where the platform is was lighter than any part of the building, the scales are right down by the shipping office and it is light enough there so you can read the figures on the scales. The scales were underneath the platform and a little to the rear of the edge of the platform. As to the extent during the time that Mr. Hansford was employed there at the warehouse, he was required to be in this part of the building where the platform was, if he was helping when I was taking charge of the shipping, anything that had to be weighed out had to go to that platform to the scales to be weighed. We had no other scales to weigh on. At various times things came down from the top floor and up from the basement to be weighed, and as Mr. Hansford had charge over the

(Testimony of Cass. G. Russell.)

first floor, he had to weigh them. As to how frequently conditions would arise requiring merchandise to be weighed, at times as much as every half hour.

My height is five feet nine and a quarter inches and standing on the floor I can touch a point seven feet seven and a quarter inches high. Anyone standing on this platform handing **[68—28]** down cans to a person standing below can easily do that by standing on this platform. By trial made this morning, my fingers would just touch that board and all he had to do was to reach it over the edge to me.

Cross-examination.

I am now a soldier in the United States Army, stationed at Vancouver. I came here as a witness at the request of the defendant. I left the employ of this defendant about December 28, 1912, and have been in the army since the first of January, 1913. The first time my attention was called to the occurrence here was when Mr. Hansford was first hurt. I had three different positions with the company. I was trucker from the first of March, 1911, until in May, 1912. In May, 1912, until the last of October I was shipping clerk, and had charge as shipping clerk on all three floors. The men on the various floors took their orders from me, and I made it my duty to give special orders with reference to the shipments to see that they were promptly gotten out and properly assembled. Mr. Hansford had been in the employ of the company about three weeks before his injury and his work had been almost en-

(Testimony of Cass. G. Russell.)

tirely on the first floor. He had worked on other floors when we were putting goods on other floors. He would do that under my directions. As to the particular work he was required to do when he first came there, he was to truck and fill orders just the same as the other men.

It is my recollection that all of the spices had not been removed from this shelf when he came there to work. As to what there was about the removal of these spices which fixed it in mind with respect to who there was employed by the company the time of the removal, there were various little incidents—with a joke and various things, I cannot remember some of them. As to one of the jokes that occurred at that time which fixed it in mind that Hansford was there helping taking these things off the shelf, **[69—29]** he tossed me a box and it came down with the lid down and I went to catch it, the lid dropped out and everything spilled all over. These spices were on top of the platform; he did not take this off that shelf. I didn't understand that you were talking about the spices on the shelf; I took those off the shelf myself and they were bulk. As to what it that fixed it in my mind that Hansford was there at the time the spices were removed from the shelf, the main reason was that all the spices were removed in two days—one day and the next night following. After that one day and one night there remained no spices there upon any of the shelves anywhere. It didn't take a week or two or anything like that to get those spices out of there. I know

(Testimony of Cass. G. Russell.)

just about the time they were changed. It was right around the 5th of June. As to whether the length of time to do it is all that causes me to think Hansford was there, I have the time down. There is nothing special to refresh my recollection about the fact that it occurred the 5th of June. I made no memorandum of it. There was nothing unusual to it. We were constantly moving goods in there but it was about two weeks before the accident that the spices were removed.

I remember the conversation that I had with Hansford on this particular day about these coffee cans, whether or not we ought to ship them in view of the fact that they would not make weight. That matter was under discussion between us. We were standing there on the floor and after I found out from the office that they were to be shipped, I stated to Hansford, "We will ship them out anyway and bill them out as 135 pounds." I made some inquiry about it and came back and told him that we were going to ship them anyhow. I didn't tell him anything about what to do.

I had frequently been up on the platform and threw stuff down myself. Just as soon as I saw him going up the ladder **[70—30]** I went to get my truck. There was nothing said between us as to how they should be *out* down. I didn't tell him that I would take them, and that I would have them handed to me. I never said I was going to assist him and didn't tell him that he might hand them to me and I would take them. I simply went over to

(Testimony of Cass. G. Russell.)

get my truck, and he went up on the platform and nothing whatever was said. After I got my truck, which was over near the door, I went over in front of this board with my truck. I observed then that Mr. Hansford was up above and had the coffee can in both hands. I reached up with both hands and took it. I stated that I can reach seven feet and seven and a fourth inches standing on the floor. I didn't say anything to Mr. Hansford. I was standing on the floor down below this board and observed that Hansford's feet were not on the board. I could see he was standing back on the platform. I made that particular observation from the distance he had to stoop. The bottom of the can came below his feet. It is not very awkward to stand back on the platform and lean over and drop this can so that I could get it, standing back on the platform. It occurred to me at that time that it would be dangerous for him to step out on the board and that he didn't do it. I didn't say anything to him about being careful, not to step out there because I supposed he knew it. He handed me in that same way three cans and I observed particularly each time that he was standing back of the board and on the platform and pushing the can out over the edge of the board. That occurred with each one. After the cans were handed to me I put them on the truck and labeled them—wrote the name on them—on a card, a shipping card—and tacked them on the side. I put the cans on the truck and fixed them. There were three of them, and the next thing I knew

(Testimony of Cass. G. Russell.)

Hansford was on the floor, after I kicked the truck away to make room for another truck load. I was kicking the truck away when he fell. I didn't see [71—31] him fall as he was handing down the fourth can and I don't know anything about how that happened.

As to whether I meant to say that all the light seemed to focus on this particular board in this particular part of the platform, not necessarily on the board, but in that vicinity. It would not appear to one standing down on the floor and looking up eight feet that the board was a part of the platform. I was there when the board was put up and know just how it was put up. I remember there had been some pieces in the center of the board that held it up. They were not taken off; they were there the day of this accident. They were not taken off. The board remained that way until long after that. They were nailed boards three feet long running away back underneath and well nailed. I saw that done,—saw them put on there and they were there at the time Hansford fell and afterwards.

Redirect Examination.

Mr. Hansford told me that he would go up on the platform and hand down the cans before I went for the truck, just after I informed him that we would ship the cans. When he started to climb the ladder to get on the platform I went after the truck. There was another support holding up this board which was a cleat or something in the nature of a cleat, three of them along there, strung about equal

(Testimony of Cass. G. Russell.)

distance along between the posts. These cleats that were attached to the uprights on which this board rested were visible to anyone standing on the floor below. They extended out for a foot beyond the posts out in the alley way. The branch of the Military Service that I am in is the engineering department.

(Examination by the Court.)

I stated that when I had the first three cans on the truck I put tags on them. I didn't see Hansford come back with the fourth. He was getting these cans about four feet back from **[72—32]** the first post east of the door. It took me about a minute to tag these cans. I had my tags all ready.

[Testimony of Henry T. Sievers, for Defendant.]

HENRY T. SIEVERS, a witness called and sworn on behalf of defendant, testified as follows:

My name is Henry T. Sievers, live at Billings and at present am driving a delivery wagon for J. M. Malin. I have been in the employ of the defendant company but don't remember the exact date. I worked for them about nine months. I quit their service the 15th day of May along there. I was in the employ of the company at the time when this shelf was put up there in front of the platform. I remember how it came to be put there. We had quite a bit of spices. All the spices were on shelves around and seemed to be mixed up a good bit. The bulk spices were kept also on the shelves around the scales and we built this extending out in front to put these bulk spices on so we could assemble

(Testimony of Henry T. Sievers.)

our orders quickly. I helped to put the board up. In a way I was the one that suggested it and helped —I helped "Chad" put it up. It was put up for the purpose of holding the bulk spices and it was never put up for the purpose of being used as a place for a person to stand on. Mr. Chaddick and I put the board up at our own suggestion. During the time that I was working there I never saw anybody use the board for the purpose of standing on it.

I am familiar with the conditions there in that part of the building as to light. There seemed always to be plenty of light there; we used the scales there, and except on real dark days, without an electric light. I think anyone on top of this platform ought to be able to notice that this board was lower than the platform and anyone standing below on the floor ought to observe it. I know I would have noticed it. As to what I know of any conversation Mr. Chaddick might have had with Russell or anybody else about this board, Mr. Russell was not [73—33] shipping clerk at this time. He left it to "Chad" and I. We worked together as much as possible putting up orders and at closing. We were together most of the afternoon working around and putting the things in order. Russell was made shipping clerk after Frank Young; I don't know the date. I have no idea whether it was in February or March.

[Testimony of Emery E. Oberweiser, for Defendant.]

EMERY E. OBERWEISER, called and sworn as a witness on behalf of the defendant, testified as follows:

My name is Emery E. Oberweiser; live in Billings and am fifteen years of age, and now driving a butcher wagon. I have been in the employ of the defendant company, worked for them about two months and quit about June 5, 1912. During the time that I worked for the company this board was there in front of the platform. I had occasion to observe that board there. When I went up on top of the platform to get lamp chimneys I noticed it. I had occasion to go up on top of the platform, and would do so by means of the ladder, and it was in that way that I observed the board. I also observed that the board was lower than the floor of the platform. I had no difficulty in seeing that. I saw it as soon as I got my head above the platform. There were not any spices on the shelf at that time that I noticed; there were not any there.

[Testimony of J. H. Johnston, for Defendant.]

J. H. JOHNSTON, called and sworn as a witness on behalf of the defendant, testified as follows:

My name is J. H. Johnston; am an attorney at law; have been such for about eighteen years, a little over; am practicing my profession in the city of Billings and came here first eighteen years ago; was away this year, and the rest of the time I have been here.

(Testimony of J. H. Johnston.)

I know the plaintiff and had a talk with him about the facts or the circumstances of this accident. I could not give you the exact date when I had this talk, but it was either one of the last two or three days of June or the first day or two of [74—34] July, 1912. It was at his home and my purpose in going there was to get the facts of the matter and make a report on it. He made a statement to me at that time. I questioned him and he made a statement. I jotted down notes from what he said. It was mostly by means of interrogations on my part and answers by him. I reduced the statement he made to writing by jotting down with a lead pencil, either in a book or on a piece of paper,—I think a small book I had. I told Mr. Hansford at that time that I wanted him to sign the affidavit, and to drop into my office a day or two later—I think the next day he dropped in—it could have been the same day. It seems in the afternoon of the next day he came into my office and I had a statement prepared from the notes in the form of an affidavit. I handed him the statement and asked him to read it and if there was anything wrong about it to make the corrections. He read it and I asked him if it was correct and he said as far as he could see it was. He and I talked a short time, for a few minutes and he said, "Could I take this out with me?" and I said "Certainly." He went out with it and I think the same afternoon—I think it was—he said his attorneys told him not to sign it. The paper which you handed me is the statement that I prepared.

(Statement offered and admitted in evidence and marked Defendant's Exhibit "A," reading as follows:)

[Defendant's Exhibit "A"—Statement.]

State of Montana,
County of Yellowstone,—ss.

William A. Hansford, being first duly sworn upon oath says: That on the 21st day of June, 1912, while in the employ of Stone-Ordean-Wells Co., at Billings, Montana, and engaged in the work of the company in their warehouse he was injured as hereinafter set out: That he was at work on a wooden platform about eight or nine feet above the first floor of the building, handing down to Mr. Russell, another employee of the company, empty coffee cans crated, which with the crating weighed about fifteen pounds each; that it was necessary to either hand the cans down or carry them down a perpendicular ladder; that prior to the injury affiant had been working in the warehouse for the company about three weeks, and had been on this platform about fifteen or twenty times before, but before the day of the accident he had only taken down things that could be easily carried [75—35] down or tossed down; that it was about three o'clock in the afternoon when he was injured, and it was pretty light in the place where he was working, as light as anywhere else on the first floor of the warehouse, but that he had just returned from the platform at the west side of the building, where he had dumped a truck of merchandise, and that the glare of the light

from the platform and side of the building made things in the building appear less distinct, when he came back into the building; that he had been back in the building about five minutes before the accident occurred; that they were filling an order of things to be shipped back to Stone-Ordean-Wells Co., at Duluth, Minn., and that at his own suggestion, affiant went on the platform to hand down the cans; that he had handed down three or four cans before the accident happened; that in front of the platform and about four inches lower than the platform, there was an inch board, twelve inches wide, which was nailed at each end to cleats on upright posts or pillars, and not otherwise supported; that affiant did not know that this board was not safe or not otherwise supported than as above stated; that he had never examined this board to see if same was safe or how it was supported; that he had never had any reason to; that about two weeks before this, Mr. McDonough ordered some partitions to be removed from beneath this platform; Mr. McDonough was the manager of the company's business at Billings, and he said at the time that the platform would be safe or reliable after the partitions were removed; that the first can was handed down from near the west post and as he handed down each successive can he moved further from the post, so that when he handed down the can at the time the accident occurred, he was about five feet from the west post; that in handing this can down, as in handing down the others, he stepped with one or both feet, but is not sure whether one

or both, upon the above-mentioned lower board, and it broke and he fell to the floor above described striking apparently on his right shoulder and right hip, breaking his right arm near the elbow and bruising his chest; that affiant was conscious all the time, but somewhat dazed by the fall; at his request they threw water in his face and gave him a drink, put his arm in a sling and he went to the doctor to have same attended to; that his arm soon began to swell and turn black, and is now swollen from several inches above the elbow to near the finger tips, and is black on the outer side from near the wrist to above the elbow; that his chest was so badly bruised that he had to call the doctor the first night to attend the same, and it still hurts him somewhat in breathing; that his arm is now in a half-cast and pains him so that he has not been able to sleep well, the greatest pain being in the wrist and upper part of the hand; that no one had ever suggested to him that the lower board mentioned above was not securely fastened or that it was dangerous, and that he had not asked whether it was safe or secure; that he does not know just what position he was in when the board broke; that the board broke almost straight across, and broke at about the point on which he was standing; that when he was handing down the cans before the board broke and until it broke and gave way there was nothing to indicate to him that it was not perfectly secure and safe, there did not appear to be any spring to it; that the bruise on the chest was probably caused by

(Testimony of J. H. Johnston.)

striking on an empty can, but affiant is not certain as to how same was caused.

..... [76—36]

Subscribed and sworn to before me this .... day of July, 1912.

.....,

Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

I could not say how many times I saw the plaintiff. I saw him at the house once and after that I called again,—I think I made the second call after that, and I saw him at the office once when he brought back the statement. At least those four times. At the time of taking the statement I told him that the purpose for which I wanted the statement was to ascertain the facts to see whether the company would be responsible, to make any settlement.

Cross-examination.

I think I was first employed to look after this matter the latter part of June, that is, to get the report, not to represent them in the case, but simply to get a report of the facts. It must have been ten or fifteen days after the accident. It was either the last two or three days in June or the first couple of days in July that I first called upon Mr. Hansford. In making my investigation of the facts I had seen Mr. Russell and talked with him, and I took an affidavit. I didn't take affidavits of all of the witnesses who appeared here, I only saw Mr. Russell and Mr. Hansford, I think, the only ones who testified except Mr.

(Testimony of J. H. Johnston.)

McDonough. I took Mr. Russell's affidavit but I have not the affidavit now. The purpose of getting this in the form of an affidavit was to get a sworn statement, as I thought it would be more reliable to get it under oath. That was my purpose. I think that at the time I went to Hansford I had had a talk with Mr. McDonough. I am not sure about Russell, but about the same time. I am not certain whether McDonough had told me how the accident occurred, I don't recall. I first called on this man down at his home and I should think that he was suffering a good deal at that time, but I could not tell. I think he was suffering quite a bit, to my best judgment. I was [77—37] there probably twenty minutes, from fifteen to twenty minutes. I talked with him about this accident and made memorandum in a book or on a slip of paper. I have not that now. I cannot show you the memorandum that was taken at that time, which I took down in the first instance. I then went down to my office and there prepared this original written statement called Defendant's Exhibit "A." I do not recall that I again talked with him before preparing it, other than the first time. My recollection is just once. I asked him to call at my office and he did so. That was long prior to the commencement of any suit, about the first days of July, I think. I would not say what was said to Mr. Hansford at the time I obtained a statement. I told him I wanted to get the facts on the question of whether they were liable and whether or not there would be a settlement. I didn't express any opinion of my own as to the

(Testimony of J. H. Johnston.)

question of liability. When Mr. Hansford called at my office, I think he himself read the statement which I had prepared. I think I handed it to him and he read it himself. I am not quite sure. My recollection is that then I asked him if it was all right and if there were any corrections to be made to make them. Told him that before he started to read it, if there were any corrections to tell me and they would be made. After he got through I asked him if it was all right, and he said "as far as he could see." As to what he said as to why he didn't sign it, I asked him if there were any corrections to make, if there were any corrections to make to make them. I don't know whether he asked—but in a very short time he asked if there was any objection to him taking this out home and I said no, none whatever. He brought it back and told me that his attorneys had advised him not to sign it and he would not. He didn't say in that communication that he had found it didn't represent the actual facts about it. When he said his attorneys advised him not to sign [78—38] it, that was all, and I didn't ask him why.

Defendant rests.

[Testimony of William A. Hansford, in His Own Behalf (Recalled in Rebuttal).]

WILLIAM A HANSFORD, recalled in rebuttal in his own behalf, testified as follows:

Q. Mr. Hansford, at the time you went down to the wholesale house after the accident, which, as I recall your testimony, was three or four days afterwards, were there any cleats on this broken board at

(Testimony of William A. Hansford.)

or near the space where the board was broken?

A. Not that I saw.

Q. Did you examine the board at that time?

A. I looked at it.

(Examination by the COURT.)

Q. You had the can in your hand when you fell. Did it fall with you?

A. I went down on top of the can.

Q. Russell wasn't ready to take it when you fell?

A. He was reaching up after it.

Q. At the very time when you fell?

A. Yes, sir.

Q. Can you say whether you stepped on that board or whether you stepped over?

A. No, I cannot.

Q. How did it break unless you stepped on it—of course, that is a mere argument possibly. Has it escaped your recollection or did you ever know so far as you know now?

A. I had no reason to think about stepping on the board at that time.

Q. I mean the fact that you do not seem able to recollect whether you stepped on the board or stepped over it and fell.

A. I stepped on the board and it broke and I went down through it.

Plaintiff rests. [79—39]

And thereupon at the close of the evidence the defendant moved the Court to instruct the jury to return a verdict in favor of the defendant as follows:

[Motion for a Directed Verdict in Favor of Defendant.]

Mr. RASCH.—Now comes the defendant in said cause and moves the Court to direct the jury to return a verdict in favor of the defendant upon the grounds and for the reason following, to wit:

1. It has been conclusively shown by the evidence, which is uncontradicted, that the board upon which the plaintiff stepped and in consequence of which he fell to the floor below, sustaining the injuries of which he complains, was not put in for the purpose of being used as a place to step upon, but the only purpose for which it was put up and intended to be used was to serve as a shelf for the goods to be kept upon such shelf, and was at no time intended to be used or used for the purpose of disposing of goods from the platform to the floor below.

2. The evidence shows that the accident and the resulting injury to the plaintiff was wholly due to the plaintiff's own negligence in the performance of the work which he was doing at the time when he stepped upon the board, resulting in the breaking of the board and his being precipitated to the floor below.

3. The evidence shows that the accident resulting in the plaintiff's injuries was entirely due to causes the risk of injuries from which he had assumed.

4. It appears from the evidence without contradiction that the method in which the plaintiff performed the work which he was performing at the time of the accident was a method adopted by him-

self, and of his own choosing, and that if there was any danger or any risk in handing down the goods or the cans from that portion of the platform along which the board extended, there were other places and other means provided in which the work could have been performed, and that if there was danger in doing the work as it was done, it was selected by the plaintiff, [80—40] choosing the dangerous way when other ways were open to him which were not dangerous.

5. There is a complete failure of proof in support of the allegations of the complaint that there was any negligence on the part of the company in the placing of the board in the manner in which it was placed, alongside of the platform, and there is no proof to show that the defendant company was negligent in any of the particulars alleged.

6. The complaint does not state facts sufficient to constitute a cause of action.

Which motion was by the Court then and there denied, to which ruling of the Court and denying the defendant's motion for a directed verdict in its favor, the defendant then and there duly excepted.

And thereupon, after argument of the case by counsel to the jury, the Court gave to the jury the following instructions:

[Instructions.]

By the COURT.—Gentlemen of the jury, the time has come for the Court to instruct you in reference to the law of the case, and it may comment upon the facts if it pleases, but in this case, while you take the law and rules of law that command and govern the

case from the Court, it is your right and duty to find the facts for yourselves. If the Court at any time in its comment on the facts in any case in this court should indicate to you what its opinion is of the facts, and what witness is telling the truth or otherwise, you are not bound by that opinion and can disregard it, unless it recommends itself to you or your conscience as well founded. You take the law from the Court for several reasons and the principal ones are:

1st. That the Court is presumed to give the law always the same, and as not every case is governed by the same law; if you were to take your own idea of the law, you might think the law is one thing, and tomorrow if the jury was left to decide it, they might say we have a different kind of law governing this [81—41] case. Furthermore, if the Court should make any mistake in the law, it is a matter of record and can hereafter be corrected; hence the reasons why you are obliged to take the law from the Court.

This is what is termed a master and servant action. The plaintiff seeks to recover damages for injuries alleged to have been received as a result of the defendant's negligence. The kinds of negligence alleged are, that the defendant had failed to provide or have any rail along the outer edge of the platform upon which the plaintiff was working.

2d. That the defendant had failed to provide a sufficient support under the board which extended beyond the edge of said platform upon which the plaintiff stepped and the breaking of which caused the plaintiff to fall.

The defense is: First: That the defendant had been

guilty of no negligence in the particulars mentioned.

Second: That the board was placed there solely as a shelf on which to deposit articles and not as a stepping place.

Third: That the plaintiff knew the situation and appreciated the circumstances involved, and hence assumed the risk of it.

Fourth: That the plaintiff's injuries were due entirely to his own negligence.

You are instructed that the plaintiff, if he recover, must do so upon the ground of the negligence alleged. It is the law that the master must exercise ordinary care to provide his servant a reasonably safe place to work. This duty which the law imposes is absolute, and the master is responsible for the negligence to any servant to whom he delegates the performance of such duty. If you find from the preponderance of the evidence that the defendant failed to provide any railing along the outer edge of said platform, and failed to provide sufficient support extending beyond the edge of the said platform, [82—42] and if you further find, in the exercise of ordinary care on the part of the defendant, it required such railing and additional support for said board, then the defendant's failure in such regard would be negligence, and if by reason thereof the plaintiff fell and was injured, the defendant would be liable for the injuries so proximately resulting, and your verdict should be for the plaintiff in such an amount as you find, under the proof and these instructions, he is entitled to receive; unless you also find that the risk or danger was communicated to the plaintiff and he was guilty of con-

tributory negligence.

In this case the burden of the proof is on the plaintiff to prove the negligence charged, to your satisfaction, by a preponderance of the evidence; otherwise you will find for the defendant.

Preponderance means the greater weight of evidence. Unless the plaintiff's own evidence has established that he was also guilty of negligence, causing the injury or contributing to the injury, or he had assumed the risk of the situation, the burden is on the defendant to prove, either that the plaintiff had assumed the risk of the situation and was himself guilty of negligence, contributing to his injury, by the preponderance of the evidence, that is to say, the greater weight of the evidence.

You are the sole judges of the credibility of all the witnesses and of the weight to be given to all the evidence. You determine the credibility of the witnesses by their interest in the case, if any; their motive, if any; their appearance and demeanor on the witness-stand; manner of testifying and the statements they make; whether they contradict themselves or are contradicted, by others. Upon all of this you make up your minds what witnesses are entitled to credit and how much weight is to be given to their testimony.

You have inspected the premises where the injury occurred. That is not to enable you to form any independent [83—43] judgment as to how it occurred, but simply that you may understand the evidence you heard in court and to better apply it, and determine where the truth lies between the parties.

All witnesses are presumed to speak the truth. This applies to the plaintiff when he testifies as well as any other witness, but of course in considering the testimony of the plaintiff, you have a right to consider his interest in the case and in the result. You are not obliged to believe a thing as so simply because some witness swears it is so. It is for you to determine whether, in any part of the testimony and to what part of it the witness is entitled to credit and how much, if any, you shall feel he is entitled to. A witness who testifies falsely before you in any manner, you have the right, if you believe any witness has so testified, you have the right to distrust the remainder of his testimony and reject it if it does not seem to you credible.

When the plaintiff took employment in the defendant's warehouse, the defendant had the right to assume that he had the reasonable skill and experience ordinarily required for such work, and the law holds the plaintiff to exercise the same degree of care for his own safety that a reasonably careful person, possessed of such skill and prudence as is ordinarily exercised under like circumstances, if you find from the evidence in this case that by the exercise of ordinary care the plaintiff would have known of the manner in which the board was placed and of the danger in using it as a place to stand on or step upon, then the plaintiff cannot recover and your verdict should be for the defendant.

It would appear from the facts in evidence here that the defendant's servants placed the board that finally broke, where it was placed, for the purpose of

a shelf only. The evidence is such that you could not come to any other reasonable conclusion, but that is not conclusive that the plaintiff would not be [84—44] entitled to recover, even though he may use that shelf as a standing place. It is for you to determine whether, under all the circumstances, considering the situation of the elevated platform and this shelf placed as it was, of the uses to which the platform was placed and the manner in which merchandise was taken down therefrom. It is for you to say whether the defendant ought to have known that this shelf might have been used as a stepping-place by its servants when taking down merchandise from the platform to the floor below. Should the defendant have reasonably anticipated that in handing down merchandise its employees were likely to step on the board; if the defendant ought to have known that the board was likely to be so used. If it should reasonably have anticipated that its servants were likely, in handing down merchandise to make use of this shelf as a stepping-place, then it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping-place, even as though it had originally erected it for that purpose. On the other hand, in your judgment, the defendant would have no reason to anticipate that it would be so used, then it had no reason to exercise any care to make it reasonably safe as a stepping-place, and fulfilled its whole duty when it made it reasonably safe for the purpose of a shelf for which it was intended. That is where your function is required, to exercise and determine that disputed point.

In reference to the matter of the absence of the railing around the platform, the Court would say to you that of itself would not justify finding that the defendant was negligent. The platform was not elevated so high, its uses in taking up and taking down merchandise were such that the railing would not be necessary in the exercise of ordinary care, for the platform alone was what was involved. Furthermore, the absence of the railing was apparent to one working upon it, and anyone working on the platform with the railing absent would assume the risk [85—45] of the absence of the rail. It would be the same as in a barn, where you have an elevated hay mow over the stalls of the horses below. You are not obliged to put any railing around it where one goes up to get hay, because he is assumed to be able to take care of himself, under such circumstances.

But if you find that with the shelf in the position as it was and that the master or defendant ought to have anticipated the likelihood of this shelf being used as a stepping-place, if you should thus find—further find that in order to avoid and prevent the employees using this shelf as a step, the exercise of ordinary care required the master to place a railing at that point, then you will find that the absence of the railing was negligence, and if it contributed to the injury of the plaintiff or caused his injury, then you would find that the plaintiff was entitled to recover.

In reference to the step, if you should find that the defendant ought to have known that its employees

were likely to use it, while that is not enough to enable you to find for the plaintiff, or to warrant you in finding for the plaintiff, unless you find that the plaintiff did use this shelf as a stepping-place,—if he, instead of stepping on it in lowering the merchandise, stepped over it and fell and some other portion of his body struck the shelf and broke it as he came down, then the negligence charged is not the cause of his injury and you would find for the defendant.

You will remember the testimony in reference to that, the plaintiff's lack of ability or apparent lack of ability to say whether he stepped on this shelf or not until at the very conclusion of the trial, when he finally said that he did.

It is for the plaintiff to prove to your satisfaction, by a preponderance of the evidence, that he did use the shelf as a stepping-place, when it broke under him, and under the circumstances you would be justified in finding a verdict for [86—46] the plaintiff.

In the matter of the orders that has been said—that has been testified that were given to him to go up on the platform, the Court, under the circumstances, is not inclined to attach any importance to this matter. The law does not attach any importance to it, for this reason, that even if the order was given, it was only to do what the plaintiff was accustomed to do and in the way he was accustomed to. It was only to go where he was accustomed to go without an order, and the order under such circumstances does not change the relation between the master and the servant. It is no inducement to the servant to do some special duty, but it is only a direction to what

otherwise he would have done, and hence it affords him no protection. It does not change the rules of law otherwise applicable, hence you can put out of mind the proposition or issue of whether or not there was an order given. It is of no materiality in this case. Furthermore, it would have to be a negligent order under the circumstances, and it is not a negligence charged in the complaint.

In permitting the plaintiff to enter into the defendant's employ, the defendant did not become the insurer of the plaintiff's safety from danger, that which under the ordinary performance of his duties he may be confronted. The only duty which the defendant owed the plaintiff in that regard was to use reasonable care in having the plaintiff's working place and appliances with which and by means of which he was required to do his work, reasonably safe for that particular use. There was a reciprocal duty which the law imposes on the plaintiff and which the plaintiff owed his employer as well, and this duty was that the plaintiff should exercise ordinary, reasonable care for his own safety and take reasonable precaution to avoid injury to himself. The master is not bound to take more care of the servant than the servant may be reasonably expected to take [87—47] for himself.

If you find from the evidence in this case, by the exercise of ordinary care, and taking reasonable precautions for his own safety in the doing of the work the plaintiff was engaged in, he could have avoided the accident, if it was the accident that resulted in his injury, then he cannot recover for such and the

verdict should be for the defendant.

You are instructed that the plaintiff had the right to assume that the defendant had furnished him a safe place to work, and to that end had exercised ordinary care and vigilance, and the risks which the plaintiff assumed were those only which were ordinarily incident to the business and which were either known to the plaintiff or were so obvious as to be readily appreciated, but the plaintiff was under no duty to make inquiry or inspect the premises where he was working to determine if they were reasonably safe, for that was the duty of the defendant, unless the plaintiff had notice or knowledge of such facts and circumstances which would indicate to any reasonably intelligent man that the presumption was that the Master had complied with his duties therein was unjustifiable, that the Master had not complied with his duties. The plaintiff was, however, bound to see and know whatever would have been seen and known by the average servant exercising ordinary care for his own safety under like circumstances whatever the average man under like circumstances and conditions ought to have seen or known and apprehended. The law conclusively presumes the plaintiff so knew and apprehended, and he will not be heard to say that he did not see, know and apprehend.

You are instructed that if you find the risk or danger from the unsupported board near the rail was as apparent to the plaintiff as to the defendant, and that each had equal opportunity and means of knowing, yet as the plaintiff had the right to rely on the

defendant for providing him a reasonably [88—48] safe place to work, and there being no duty on the plaintiff to inquire into and inspect the sufficiency and safety of the platform, he was not necessarily guilty of contributory negligence in going upon said platform and handing down said cans unless the danger was so apparent that a prudent man would not have incurred it, unless you find that in what he did he did not act as a reasonably careful and prudent man would act under like circumstances. The fact, if it be one, that it is now apparent that there was a safer way in which the work could be done is not conclusive against the plaintiff but it may be considered by you, but that itself it is not sufficient to say he was guilty of contributory negligence by doing the work as he did, or that he assumed the risk of doing the work as he did. If no particular instructions were given the plaintiff as to how he should hand down the cans, and if the plaintiff in good faith adopted a more hazardous way, and if the way chosen was one which would have been adopted *or* the ordinarily careful and prudent person under like circumstances, the plaintiff would not be guilty of contributory negligence.

If you find that the defendant was negligent as charged and that the plaintiff was not guilty of contributory negligence as you have been instructed, and if you find also that the plaintiff did not assume the risks of the situation there, and if you find that the defendant's negligence proximately resulted in the injury to the plaintiff and the plaintiff is en-

titled to recover herein, then the measure of his recovery would be an amount which would compensate him for loss of time, lessened ability to earn wages, if any, which has occurred by reason of the said injuries, together with such sum as will reasonably compensate him for his loss by reason of ability to perform manual labor, together with such further sum or amount as will fairly and reasonably compensate the plaintiff for physical pain and suffering and mental anguish already endured and such as you may [89—50] find he may be reasonably expected to suffer in the future, if any, not exceeding, however, the sum mentioned in the complaint, to wit, Twenty-five Thousand Seven Hundred Twenty-five ($25,725) Dollars.

When you retire to your jury-room you will select a foreman and proceed to a verdict. Twelve of your number must agree on any verdict you find in this case.

By the COURT.—Gentlemen, have you any exceptions to make to the instructions?

[Exception to Certain Instructions.]

Mr. RASCH.—In order to save the point, your Honor, referred to and discussed yesterday evening, the defendant now excepts to that part and portion of the Court's charges to the jury which is to the effect that the placing of the board for the purpose of being made use of as a shelf only is not conclusive that plaintiff is not entitled to recover, but that if the defendant should have reasonably anticipated that it might be made use of as a stepping-place,

it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping-place as though it had originally been placed there for that purpose. And further, that if the defendant ought to have anticipated the likelihood of this shelf being made use of as a stepping-place, and to avoid the use of the shelf as a stepping-place ordinary care required the defendant to place a railing at that point, that then the absence of the railing was negligence, for the reason that the same is not applicable to the issues under the pleadings and is not warranted by the evidence in this case.

And thereupon the jury retired to consider of their verdict, and thereafter returned into court their verdict in favor of the plaintiff and against the defendant for the sum of Five Thousand ($5,000) Dollars.

And thereafter on the 11th day of June, 1913, judgment was [90—51] rendered in favor of said plaintiff and against said defendant for the said sum of Five Thousand ($5,000) Dollars, with interest thereon at eight per cent per annum from the date thereof until paid, together with plaintiff's costs and disbursements amounting to the sum of $43.60.

And thereupon the Court made an order granting the defendant sixty days from and after the said 9th day of June, 1913, within which to prepare and serve its bill of exceptions.

And now comes the said defendant, Stone-Ordean-Wells Company, and presents this its proposed bill of exceptions in said cause and prays that the same

may be approved, settled and allowed by the Court as provided by law.

J. H. JOHNSTON and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Due service of the foregoing proposed bill of exceptions of the defendant Stone-Ordean-Wells Company is hereby acknowledged and receipt of copy thereof accepted and admitted this 4th day of August, 1913.

NICHOLS & WILSON,
Attorneys for Plaintiff.

[Stipulation as to Bill of Exceptions.]

It is hereby stipulated and agreed by and between the parties to said above-entitled cause that the foregoing proposed bill of exceptions is a full, true and correct bill of exceptions as to the proceedings at and the evidence adduced in said cause, and that the same contains all of the testimony and evidence adduced at the trial of said cause, and the same may be approved, settled and allowed by the Court as provided by law. [91—52]

Dated this .... day of ....., 1913.

....,
Attorneys for Plaintiff.

....,
Attorneys for Defendant.

[Order Settling, Allowing and Approving Bill of Exceptions.]

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the District Court of the United States, for the District of Montana, before whom the foregoing-entitled cause was tried, do hereby certify that the foregoing is a full, true and correct bill of exceptions in said action of the proceedings had, and contains all the evidence adduced at the trial of said cause and the same is now by me hereby settled, allowed and approved as true and correct bill of exceptions in said action.

Dated this 25th day of Sept., 1913.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Bill of Exceptions. Filed Sept. 25, 1913. Geo. W. Sproule, Clerk. **[92—53]**

Thereafter, on November 8, 1913, defendant's Assignment of Errors was duly filed herein, in the words and figures following, to wit: **[93]**

In the District Court of the United States, for the District of Montana.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes the defendant, Stone-Ordean-Wells Company, and files the following assignment of errors, upon which it will reply in the prosecution of the writ of error issued in its behalf in the above-entitled cause:

1. The United States District Court, in and for the District of Montana, erred in denying and overruling the defendant's motion made at the close of the evidence of the case to direct the jury to return a verdict in favor of the defendant.

2. The United States District Court, in and for the District of Montana, erred in charging the jury, in the instructions given by the Court, to the effect that the placing of the board for the purpose of being made use of as a shelf only was not conclusive that plaintiff was not entitled to recover, but that if the defendant should have reasonably anticipated that it might be made use of as a stepping place, it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping-place, as

though it had originally been placed there for that purpose, and which part and portion of the instructions of the court in which the jury were so charged reads as follows:

> "It would appear from the facts in evidence here, that the defendant's servants placed the board that finally broke, where it was placed, for the purpose of a shelf only. [94] The evidence is such that you could not come to any other reasonable conclusion, but that is not conclusive that the plaintiff would not be entitled to recover, even though he may use that shelf as a standing place. It is for you to determine whether, under all the circumstances, considering the situation of the elevated platform and this shelf placed as it was, of the uses to which the platform was placed and the manner in which merchandise was taken down therefrom. It is for you to say whether the defendant ought to have known that this shelf might have been used as a stepping place by its servants when taking down merchandise from the platform to the floor below. Should the defendant have reasonably anticipated that in handing down merchandise its employees were likely to step on the board; if the defendant ought to have known that the board was likely to be so used. If it should reasonably have anticipated that its servants were likely, in handing down merchandise to make use of this shelf as a stepping-place, then it would be held to the same duty to exercise

ordinary care to make it reasonably safe for a stepping place, even as though it had originally erected it for that purpose."

3. The Court erred in charging the jury in the instructions given by the Court, to the effect that if the defendant ought to have anticipated the likelihood of this shelf being made use of as a stepping-place, and to avoid the use of the shelf as a stepping-place, ordinary care required the defendant to place a railing at that point, that then the absence of the railing was negligence, and which part or portion of the instructions given by the Court, in which the jury were so charged, reads as follows:

"But if you find that with the shelf in the position as it was and that the Master or defendant ought to have anticipated the likelihood of this shelf being used as a stepping-place, if you should thus find—further find that in order to avoid and prevent the employees using this shelf as a step, the exercise of ordinary care required the Master to place a railing at that point, then you will find that the absence of the railing was negligence, and if it contributed to the injury of the plaintiff or caused his injury, then you would find that the plaintiff was entitled to recover."

4. The United States District Court, in and for the District of Montana, erred in rendering and entering judgment in said cause in favor of the plaintiff and against the defendant, and that the said judgment is contrary to law and the facts established at the trial of said cause.

WHEREFORE, the said defendant and plaintiff in error prays [95] that the said judgment of the said District Court of the United States, in and for the District of Montana, be reversed.

J. H. JOHNSTON and
GUNN, RASCH & HALL.
Attorneys for Defendant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Nov. 8, 1913. Geo. W. Sproule, Clerk. [96]

Thereafter, on November 8, 1913, Petition for Writ of Error and Order allowing same were duly filed and entered herein, in the words and figures following, to wit: [97]

In the District Court of the United States, for the District of Montana.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Petition for a Writ of Error and Supersedeas of the Defendant, Stone-Ordean-Wells Company.

Stone-Ordean-Wells Company, defendant in the above-entitled cause, feeling itself aggrieved by the proceedings had in said cause, and by the decision of the Court and the judgment entered in said cause on

the 11th day of June, 1913, for the sum of Five Thousand ($5,000.00) Dollars damages, and the further sum of Forty-three and 60/100 ($43.60) Dollars costs, in favor of said plaintiff and against said defendant, comes now, by J. H. Johnston and Gunn, Rasch & Hall, its attorneys, and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit. And your petitioner will ever pray.

J. H. JOHNSTON and
GUNN, RASCH & HALL,
Attorneys for Defendant. [98]

Order Allowing Writ of Error and Fixing Amount of Bond Thereon.

Upon motion of Gunn, Rasch & Hall, attorneys for the defendant, Stone-Ordean-Wells Company, the foregoing petition for a writ of error is hereby granted, and it is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein on the 11th day of June, 1913, and that the amount of the

bond on said writ of error be, and is hereby, fixed at $7,500.00.

GEO. M. BOURQUIN,
Judge.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error and Supersedeas. Order Allowing Writ and Fixing Bond. Filed and entered Nov. 8, 1913. Geo. W. Sproule, Clerk. [99]

Thereafter, on December 2, 1913, Bond on Writ of Error was duly approved and filed herein, in the words and figures following, to wit: [100]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Stone-Ordean-Wells Company, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto William A. Hansford in the full and just sum of $7,500.00, to be paid him, his attorneys, executors, administrators or assigns, for the payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 10th day of November, A. D. 1913.

WHEREAS, lately, at a session of the District Court of the United States, in and for the District of Montana, in an action pending in said court be-

tween William A. Hansford, as plaintiff, and Stone-Ordean-Wells Company, defendant, a final judgment was rendered against the said defendant and in favor of said plaintiff, and the said Stone-Ordean-Wells Company, defendant, having obtained from said court a writ of error to reverse the judgment in the aforesaid action, and a citation directed to said William A. Hansford is about to be issued, citing and admonishing him to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, California:

NOW, THEREFORE, the condition of the above obligation is such that if the said Stone-Ordean-Wells Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said Stone-Ordean-Wells Company has caused these presents to be executed by its Treasurer [101] thereunto duly authorized, and its corporate seal to be affixed, and the said United States Fidelity & Guaranty Company has caused these presents to be executed by its attorney in fact, also thereunto duly authorized, and its

corporate seal to be affixed hereto, on this 10th day of November, A. D. 1913.

STONE-ORDEAN-WELLS COMPANY,

[Seal] By R. A. HORR, Treasurer,
Thereunto duly authorized,
Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY,

[Seal] By W. P. MATHESON,
Its Attorney in Fact, thereunto duly authorized,
Surety.

[Endorsed]: Title of Court and Cause. Bond on Writ of Error. Filed Dec. 2, 1913. Geo. W. Sproule, Clerk.

The within bond is hereby approved.

Dec. 2, 1913.

BOURQUIN,
U. S. District Judge. [102]

Thereafter, on December 2, 1913, Writ of Error was duly issued herein, which said Writ is hereto annexed, and is in the words and figures following, to wit: [103]

[Writ of Error (Original)].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, in and for the District of Montana, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court, and between Stone-Ordean-Wells Company, a corporation, plaintiff in error, and William A. Hansford, defendant in error, a manifest error hath happened, to the great damage of the said Stone-Ordean-Wells Company, the plaintiff in error, as by their complaint appears:

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 1st day of January, 1914, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 2d day of December, in the year one thousand nine hundred and thirteen.

[Seal] GEO. W. SPROULE,

Clerk of the District Court of the United States, in and for the District of Montana.

The foregoing writ of error is hereby allowed.
Dec. 2, 1913.

GEO. M. BOURQUIN,
District Judge. [104]

Service of the within and foregoing writ of error and receipt of copy thereof is hereby acknowledged this 3d day of Dec., 1913.

NICHOLS & WILSON,
Attorneys for Defendant in Error. [105]

Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, in a certain schedule to this Writ annexed, as within I am commanded.

By the Court:

[Seal] GEO. W. SPROULE,
Clerk. [106]

[Endorsed]: No. 290. United States District Court, District of Montana. William A. Hansford, Defendant in Error, vs. Stone-Ordean-Wells Company, Plaintiff in Error. Writ of Error. Filed Dec. 5, 1913. Geo. W. Sproule, Clerk. [107]

Thereafter, on December 2, 1913, a Citation was duly issued herein, which Citation is hereto annexed, and is in the words and figures following, to wit: [108]

Citation on Writ of Error.

The President of the United States, to William A. Hansford and Messrs. Nichols & Wilson, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, in and for the District of Montana, wherein Stone-Ordean-Wells Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 2d day of December, A. D. 1913, and of the Independence of the United States the one hundred and thirty-seventh.

GEO. M. BOURQUIN,
United States District Judge.

Service of the foregoing citation acknowledged and copy thereof received this 3d day of Dec., A. D. 1913.

NICHOLS & WILSON,
Attorneys for Defendant in Error. [109]

[Endorsed]: No. 290. United States District Court, District of Montana. William A. Hansford, Defendant in Error, vs. Stone-Ordean-Wells Company, Plaintiff in Error. Citation on Writ of Error. Filed Dec. 5, 1913. Geo. W. Sproule, Clerk. [110]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 111 pages, numbered consecutively from 1 to 111, inclusive, is a true and correct transcript of the pleadings, process, verdict and judgment, and all other proceedings had in said cause, and the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I further certify and return that I have annexed to said transcript and included in said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Twenty-one and 90/100 Dollars ($21.90), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand

and affixed the seal of said court at Helena, Montana, this 22d day of December, A. D. 1913.

[Seal] GEO. W. SPROULE,
Clerk. [111]

[Endorsed]: No. 2355. United States Circuit Court of Appeals for the Ninth Circuit. Stone-Ordean-Wells Company, a Corporation, Plaintiff in Error, vs. William A. Hansford, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received and filed December 26, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

STONE-ORDEAN-WELLS COMPANY,
a corporation,
Plaintiff in Error,

vs.

WILLIAM A. HANSFORD,
Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

The defendant in error, hereinafter, for convenience, called the plaintiff, brought this action in the state court against the plaintiff in error, hereinafter referred to as the defendant, a corporation existing under the laws of the state of Maine, for the recovery of $25,725.00 damages, on account of

personal injuries, sustained by him while in the employ of the defendant, at Billings, Montana, on the 21st day of June, 1912. The case was removed to the District Court of the United States, for the District of Montana, on the ground of diversity of citizenship of the parties (Tr. p. 21), and came on for trial on June 5, 1913, before a jury, which returned a verdict for $5000.00 in favor of the plaintiff, and judgment having been entered upon the verdict, the defendant, claiming that error was committed at the trial of the case in the court below, brings the case here, by writ of error, for review (Tr. p. 112).

The plaintiff entered into the defendant's service on June 1, 1912, the duties of his employment requiring him to receive and distribute goods and merchandise in defendant's warehouse at Billings, and to assemble them for shipment on the first floor of the warehouse. In substance, it is alleged in his complaint that the defendant maintained a platform or staging for the storage of goods about thirty feet long and twenty feet wide, about nine feet above the first floor of the warehouse, supported by upright pillars, ten by twelve inches in size, set about ten feet apart, and was reached by means of an upright ladder from the main floor; that the platform was constructed of common pine lumber or boards, laid on two by four inch stringers, but was without railing of any kind about the outside thereof (Tr. p. 3).

That at the outer edge of the platform the defendant had placed a board about ten feet in length, and of the same kind and dimension as those used in the construction of the floor of the platform, without support, except one inch cleats fastened to the upright posts, upon which it rested (Tr. p. 3). That on June 21, 1912, the plaintiff was directed to assemble for shipment some crated coffee cans on the platform, and to hand them down to another employee, stationed on the floor below to receive them; that while he was handing down one of the cans he stepped upon the board, breaking it, and fell to the floor below, receiving the injuries complained of (Tr. pp. 3-4). It is alleged that plaintiff was at all times in the exercise of due care and caution, and that his injuries were caused by defendant's negligence in failing to provide a suitable railing along the outside edge of the platform, and in failing to provide sufficient supports under the board (Tr. p. 4).

In its amended answer the defendant admits plaintiff's employment; that while so employed he fell from the platform to the floor below, and that there was no railing around the platform, but denies that it was negligent in any of the particulars charged in the complaint. It is alleged that the board was not a part of the platform, but separate therefrom, and from three and one-half to four inches below the floor of the platform; that the

board was eleven feet long, and about ten inches wide, and placed at right angle to the boards in the floor of the platform (Tr. p. 28). It is also alleged that the board was not intended or placed there to be stepped upon by anyone, as was patent and plainly apparent from its position and the manner in which it was fastened, which the plaintiff knew, or should have known, by the exercise of any care or caution at all (Tr. pp. 28-29). In paragraph 9 of the amended answer it is alleged that plaintiff's injuries were proximately due to, and caused by, his own fault and carelessness, and in paragraph 10 the defendant pleads that the injuries were proximately due to causes the risk of injury from which he had assumed (Tr. pp. 29-32). In his replication the plaintiff denies the allegations of paragraphs 9 and 10 of the amended answer; that is to say, that the injuries were caused by his own negligence, or that they were due to causes the risk of injury from which he had assumed (Tr. p. 33).

The evidence shows substantially the following facts: The plaintiff, a man thirty years of age, entered the defendant's employ on June 1, 1912. Prior to that time he had been employed in various occupations (Tr. p. 38). The defendant's warehouse contained three floors, and most of plaintiff's work kept him on the first or main floor of the building, where he was required to receive goods and distribute them, and to get them ready for shipment as

occasion demanded (Tr. pp. 38-39). The platform was on the first floor of the warehouse, in the northwest corner of the building, extending easterly thirty feet in length and southerly twenty feet in width (Tr. p. 39). It was eight feet and one and one-half inches above the main floor (Tr. p. 70), and was used for the storing of merchandise upon it, such as spices, clothes pins, lamp chimneys and lantern globes (Tr. p. 39). Access was had to the platform by means of a ladder, located at the east end (Tr. p. 39).

On June 21, 1912, an order had been given for the shipment of some empty coffee cans, which were on the platform, their weight being about fifteen pounds each (Tr. pp. 39-40). The plaintiff either by direction of shipping clerk Russell (Tr. p. 40), or voluntarily (Tr. pp. 69, 83), went upon the platform to hand the cans down to Russell, who was standing on the floor below to receive them, and, in doing so, the plaintiff would simply take hold of the top of the can, stoop over and hand them from the edge of the platform to Russell, who would take them (Tr. p. 40). He had handed down two or three cans in that way, and then, in handing, or attempting to hand down another can, the board broke, and he fell to the floor (Tr. p. 41). He had not observed, when handing down the previous cans, whether he stepped on the board (Tr. p. 44), and when interrogated by the court, he stated that he did not remember

whether he stepped on the board when the first cans were handed down (Tr. p. 56). He had not testified, upon the completion of his testimony in chief, whether he stepped on the board when it broke, but when interrogated by the court upon that point, stated that he guessed he was on the board when it broke, but "could not say for sure" (Tr. p. 56). At the close of the case, no evidence having been introduced to show that the plaintiff was on the board when it broke, the court again interrogated him as follows:

> "Q. Can you say whether you stepped on that board or whether you stepped over it?
>
> "A. No, I cannot.
>
> "Q. How did it break unless you stepped on it—of course that is a mere argument possibly. Has it escaped your recollection or did you ever know, so far as you now know?
>
> "A. I had no reason to think about stepping on the board at that time.
>
> "Q. I mean the fact that you do not seem able to recollect whether you stepped on the board or stepped over it and fell?
>
> "A. I stepped on the board and it broke and I fell down through it." (Tr. p. 88).

The board was put up between the pillars, supported by cleats nailed to the sides of the pillars, by

some of defendant's employees in February or March, 1912, for the purpose of a shelf to put spices upon, and it was used as a shelf and for no other purpose (Tr. p. 57, 58, 63). It was from three and one-half to four inches below the floor of the platform, and no one had ever been observed to make use of it as a place to step or stand upon (Tr. pp. 65, 79). There was a large door at the west end of the platform, and a window five feet square above it, three doors to the south, and both doors and windows at the east end of the building (Tr. p. 64). The wheather was warm and the sun shining on the day the plaintiff was injured, all of the doors of the warehouse were open (Tr. pp. 64-65), the plaintiff facing one of the side doors to the south, when on the platform handing down the cans (Tr. p. 57). The passageway, used for the handling and movement of goods and merchandise, ran in front of the platform, and the plaintiff had been on the platform at least fifteen or twenty times prior to the day of the accident (Tr. p. 45-46), and had also from time to time been on the floor below, receiving goods tossed down from the platform, upon which occasions the person's vision, while waiting and looking for the articles as they were tossed or handed down, would be in the direction of the board (Tr. p. 52)). The place was well lighted, and the position of the board, that it rested upon cleats between the pillars and was not a part of the platform but

some distance below the floor of the platform, was readily observable (Tr. pp. 60-61; 65; 71-72; 79; 80). But the plaintiff never paid any attention to it (Tr. p. 47). He supposes that if a person had looked in the direction of the board, he would have seen how it was placed and fastened ((Tr. p. 48), but he never noticed it (Tr. pp. 48, 53). He does not know whether, if he had paid any attention to his surroundings, he could have seen the position of the board at a glance, but he states that he would have seen it if he had gone there and examined it (Tr. pp. 49-50).

At the close of the evidence, the defendant moved the court to instruct the jury to return a verdict in favor of the defendant, which the court denied (Tr. pp. 89-90), and instructed the jury that although it appeared, and the evidence was such, that the jury could come to no other conclusion but that the board was placed by the defendant's servants for the purpose of a shelf only, that this fact would not preclude plaintiff's recovery; that if the defendant should reasonably have anticipated and known that its servants were likely, in handing down merchandise, to make use of the shelf as a stepping place, it would then be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping place as if defendant originally erected it for that purpose. The court further instructed the jury that the absence of a railing

around the platform would not of itself amount to negligence, yet if the defendant should have anticipated and known the likelihood of the shelf being used as a stepping place, and in order to avoid and prevent the employees from so using the shelf, the exercise of ordinary care required the defendant to place a railing at that point, then the absence of the railing was negligence (Tr. pp. 93-96).

ASSIGNMENT OF ERRORS.

1. The court erred in denying and overruling the defendant's motion made at the close of the evidence of the case to direct the jury to return a verdict in favor of the defendant (Tr. p. 105).

2. The court erred in charging the jury, in the instructions given by the court, to the effect that the placing of the board for the purpose of being made use of as a shelf only was not conclusive that plaintiff was not entitled to recover, but that if the defendant should have reasonably anticipated that it might be made use of as a stepping place, it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping place, as though it had orginally been placed there for that purpose, and which part and portion of the instructions of the court in which the jury were so charged reads as follows:

"It would appear from the facts in evidence here, that the defendant's servants placed the board that finally broke, where it was placed, for the purpose of a shelf only. The evidence is such that you could not come to any other reasonable conclusion, but that is not conclusive that the plaintiff would not be entitled to recover, even though he may use that shelf as a standing place. It is for you to determine whether, under all the circumstances, considering the situation of the elevated platform and this shelf placed as it was, of the uses to which the platform was placed and the manner in which merchandise was taken down therefrom. It is for you to say whether the defendant ought to have known that this shelf might have been used as a stepping place by its servants when taking down merchandise from the platform to the floor below. Should the defendant have reasonably anticipated that in handing down merchandise its employees were likely to step on the board; if the defendant ought to have known that the board was likely to be so used. If it should reasonably have anticipated that its servants were likely, in handing down merchandise to make use of this shelf as a stepping place, then it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping place,

even as though it had originally erected it for that purpose." (Tr. pp. 105-107).

3. The court erred in charging the jury in the instructions given by the court, to the effect that if the defendant ought to have anticipated the likelihood of this shelf being made use of as a stepping place, and to avoid the use of the shelf as a stepping place, ordinary care required the defendant to place a railing at that point, that then the absence of the railing was negligence, and which part or portion of the instructions given by the court, in which the jury were so charged, reads as follows

> "But if you find that with the shelf in the position as it was and that the master or defendant ought to have anticipated the likelihood of this shelf being used as a stepping place, if you should thus find—further find that in order to avoid and prevent the employees using this shelf as a step, the exercise of ordinary care required the master to place a railing at that point, then you will find that the absence of the railing was negligence, and if it contributed to the injury of the plaintiff or caused his injury, then you would find that the plaintiff was entitled to recover." (Tr. p. 107).

4. The court erred in rendering and entering judgment in said cause in favor of the plaintiff and against the defendant. (Tr. p. 107).

ARGUMENT.

I.

The negligence charged in plaintiff's complaint, which it is alleged was responsible for his fall, and the resulting injury, was the failure of defendant to provide a suitable railing along the outside edge of the platform, and that defendant failed to provide sufficient supports under a board placed at the outer edge of said platform. The absence of a railing was admitted in defendant's answer, and nothing more was heard regarding it during the trial of the case until adverted to by the court in its instructions to the jury. There is no allegation in the complaint, and no attempt was made at the trial to show, that a railing could have been put around the platform without rendering impracticable the use of the platform for the purpose for which it was made and intended; no attempt was made to show, and it does not appear, how a railing such as would not have interferred with the use of the plaftorm for the purpose intended, would have prevented the plaintiff from falling, and there is nothing in the case from which an inference even could have been drawn that the plaintiff would not have fallen, if such railing as the practical use of the platform for the purpose intended would have permitted had actually been constructed. There is not a scintilla of evidence that the absence of a rail-

ing had anything at all to do with the plaintiff's fall, and as the plaintiff knew that no such railing had been provided, no attempt was made at the trial to attribute his injuries to its absence. The only ground relied upon at the trial for a recovery was the absence of sufficient supports under the board which broke, causing plaintiff's fall.

With reference to the board, the complaint alleges the defendant had placed it "at the outer edge of the platform." In other words, that it was a continuation or extension of the platform and a part thereof, and the negligence charged was the failure "to provide sufficient supports under" it. The answer alleges, and the conceded and admitted facts of the case are, that the board was not a continuation or a part of the platform, but that it was suspended between the two pillars, resting upon cleats, from three and one-half to four inches below the floor of the platform; that it was put there to be used, and was used, as a shelf, and for no other purpose; that from the time it was put there until the plaintiff's fall, no one had ever been seen to make use of it as a stepping place, and its position, and the way in which it was fastened, were plain and apparent to anyone who took the pains to look at it.

The facts thus established, by admissions and proof at the trial, are the facts alleged in defendant's amended answer in defense of the case. It

may be that if the board had been placed in a position so as to invite, or its appearance mistakenly caused, its use for a purpose other than the one for which it was put up and for which it was intended, that negligence might be predicated for failure to render it sufficient for such use. But that is not the case made in plaintiff's complant. It is not pretended that the board was not sufficiently provided with supports to serve as a shelf, but the negligence charged is that it was not sufficiently supported to serve as a part of the platform—as a place to step or stand upon. But there is nothing either in the pleadings or the proof tending to show that it was ever used for such purpose prior to the plaintiff's accident by anyone, or that there was anything deceptive or misleading in its appearance, and the position in which it was placed, which might possibly cause any one to be mistaken about its nature and purpose. The facts established at the trial, and the theory upon which the case was submitted to the jury, was not the case made in plaintiff's complaint, and what was said by the supreme court of Montana in the case of Flaherty v. Butte Electric Ry. Co., 40 Mont. pages 464, 465, is applicable here:

> "The plaintiff may, if he so elects, narrow the issues to a single act of negligence, but, having done so, he must be confined in his proof

to such act. He 'cannot assert a right to go without the lines within which he voluntarily confined himself.' * * *

"Over the objection of defendants the court submitted the case to the jury upon the theory that if the defendants were shown to be negligent in any respect, the plaintiff could recover; and under this general charge the jury might well have determined that LeSage was negligent in keeping a proper lookout. In fact, it appears to us to be the only negligence which the evidence tends to prove. But that was not the negligence charged, and could not be considered. * * * Under the view of the pleading which we have taken, the theory of the case entertained by the trial court, as disclosed by the instructions given, was erroneous."

In Perry v. Barnett, 65 Ind. 522, the defendant was a road supervisor, and the negligence charged was that he had placed in a public highway, at a point where the same crosses a deep and dangerous bayou,

"a structure or pile of wooden timbers, intended to serve as a bridge,"

so carlessly placed there by the defendant that plaintiff's mules fell through and over the timbers, causing their death. The proof was that the

structure or pile mentioned in the complaint was a bridge built across the bayou, that it was so defectively constructed that plaintiff's mules went through, causing one to fall over the edge of the bridge upon the ice below, killing it, and injuring the other so badly that it died a few months thereafter. In reversing a judgment in favor of plaintiff, the court said:

> "The theory of the complaint is, that the defendant carelessly and wilfully placed an obstruction in the highway. The evidence does not show such obstruction. * * *
>
> "We are of opinion that the evidence did not support the cause stated in the complaint; in other words, that the complaint was not proved 'in its general scope and meaning.'"

In Shanke v. United States Heater Co., (Mich.) 84 N. W. 283, the complaint alleged that boards placed upon the ground for a passageway for trucks

> "were unfit for the purpose, because they were uneven, unsound, rotten, unsafe and defective, by reason of which the said path or paths or passageway upon said yard became and were in a dangerous and unsafe condition."

The boards were placed end to end, and as the

wheels of the loaded truck came to the end of a board, it would press the end more or less into the soft soil. Plaintiff and another employee were ordered on the day of the accident to wheel some castings into the defendant's shop. Plaintiff was in front of the truck, pulling it, facing the truck, and his co-employee was behind, pushing. The plaintiff, in describing the accident, testified:

> "There was a board there underneath, and the wood kept digging into the ground so that it caused a hole, and as I was about to lift, to start it, the board broke. I fell to my knees, and the casting on top of me."

He also testified that the boards looked as though they had never been used before. In sustaining the action of the trial court, directing a verdict for the defendant, the supreme court of Michigan said:

> "The instruction was correct. The theory of the declaration is not that sound unused boards were not sufficient, or that the ground was soft, but the sole theory of the declaration is that the boards were uneven, unsound, rotten, unsafe and defective in consequence of which the place was unsafe. Plaintiff cannot now recover upon the theory that sound boards were not sufficiently strong, or that the ground

was unsafe, so that the ends of the board would be pressed into it by the weight upon them."

In Forsell v. Pittsburg and Montana Copper Co., 38 Mont. 403, an action for damages on account of injuries sustained because of an alleged defective hoisting engine, the plaintiff charged negligence on the part of the defendant in that

> "it negligently permitted the brakes on said engine to be defective and in such condition that no man could clamp them tight enough to prevent the cage from slipping down the shaft when the cage would be placed at rest by said engineer."

Upon the trial, the court permitted evidence to be given on behalf of plaintiff tending to show:

> "that the brake used was too light for the work imposed upon it, that the hoisting engine was defective, that the exhaust from the engine was not properly connected, and the effect of the back pressure of the steam."

Also,

> "that instead of a handbrake, such as was used, a post brake should have been used."

In reversing the judgment of the court

below, in plaintiff's favor, the supreme court, first quoting from Pierce v. Great Fall & C. Ry. Co., 22 Mont. 445, said:

> "In the case at bar, however, the plaintiff, instead of stating generally the failure of the defendant to exercise care in the discharge of its duties, alleged in her pleadings the particulars in which the negligence of defendant consisted. She could not recover for negligence in any other respect, for a plaintiff must stand upon the cause of action stated in the complaint."

The court then proceeds as follows:

> "That this rule is correct would seem to be too plain to require argument or citation of authorities. Our Code (Revised Codes, sec. 6532) requires the complaint to contain a statement of the facts constituting the cause of action. 'It would be folly to require the plaintiff to state his cause of action, and defendant to disclose his grounds of defense, if in the trial either or both might abandon such grounds and recover upon others which are substantially different from those alleged."

As in the cases above cited, so here in the case at bar, the plaintiff failed to establish the case made in his complaint, and the motion for a

directed verdict should have been granted, for, as was said by the supreme court of Indiana, in Feder v. Field, 20 N. E. on page 131:

> "The law is well settled that a complaint must proceed upon a definite theory; that the case must be tried on the theory constructed by the pleadings; and such a judgment as the theory warrants must be rendered, and no other or different one."

To the same effect:

Knuckey v. Butte Electric Ry. Co., 41 Mont. 314;

Bracey v. Northwestern Improvement Co., 41 Mont. 338;

Gregory v. Chicago, M. & St. P. Ry. Co., 42 Mont. 551;

Ebsery v. Chicago City Ry. Co., (Ill.) 45 N. E. 1017;

Gardner v. Metropolitan Street Ry. Co. (Mo.) 122 S. W. 1068; 18 Ann. Cases 1166;

Pennington v. Detroit etc. Ry Co., (Mich.) 51 N. W. 634.

II.

That the board was placed between two pillars for the purpose of serving as a shelf is undisputed; in fact, the court told the jury that the evidence admitted of no other conclusion. It had never been used for anything else, and no one had ever seen it used for any other purpose. Its position and the manner in which it was fastened was perfectly plain and obvious, and the plaintiff himself admits that he could have seen it if he had taken the trouble to look at it. The only reason which he gives for not knowing, is that he never paid any attention to it. Anyone standing on the platform, giving the slightest attention to his surroundings, could see that the board was not a part of the platform, but that it was some distance below it. Young Oberweiser, a boy fifteen years old, saw it the first time he went on the platform. He had no difficulty in observing that the board was lower than the floor of the platform, and saw it as soon as he got his head above the platform. (Tr. p. 80).

If the plaintiff actually stepped on the board, as he finally told the court he did, after he had twice before stated that he did not know, he did so without using any kind of care for his own safety. The place was well lighted and everything in plain sight, and even if the plaintiff had not tak-

en the pains before this time to familiarize himself with his surroundings, the situation was such that a mere glance would have disclosed to him the position of the board. It is not claimed that he stepped on the board accidently, or that he was forced to do so because of an emergency. There is no pretense that there was any hurry or confusion, or that he did not have full opportunity to take some little care of himself while doing the work, which was a duty which he not only owed to himself, but to his master as well. But, according to plaintiff's own story, he rendered his twenty-one days services for defendant as a mere automaton or machine, neither informing himself of the conditions which existed in the place of his employment, and where his work was daily and hourly required to be done, nor using his sight to see what could readily have been seen. He shut his eyes and went about blindly, oblivious to everything which was perfectly plain and obvious to the most casual observation. He deliberately stepped upon the board without cause or reason, with the knowledge, which the law conclusively imputes to him,notwithstanding his assertion of ignorance, that the board was not a part of the platform and was not an appliance or instrumentality that could safely be used for the purpose for which he used it. His own unexplained and inexcusable carelessness was the cause of his accident.

In the words of the supreme court of New York, in McDugan v. New York etc. R. Co., 31 N. Y. Supp. 135, affirmed by the court of appeals in 155 N. Y. 631:

> "The action proceeds on the postulate of a violation of a duty on the part of the defendant to the plaintiff. But to one engaging in service with knowledge of an unsafe place or appliance a master is under no obligation to alter or amend the condition of the place or appliance. By entering upon the employment with such knowledge, the servant himself assumes the hazards of the dangerous place or appliance, and if, *by due diligence the servant may ascertain the danger, but choses rather to forbear the exercise of that care, such opportunity of knowledge is the legal equivalent of knowledge. In law what a man ought to know he does know.*" (Italics ours).

Or, as was said by the supreme court of Utah, in Palmer v. O. S. L. R. Co., 16 Ann. Cases, on page 238:

> "The ability to see was in the eye of the law, tantamount to seeing. The negligence, in such events, would consist in not seeing what ought to have been seen, and the fact whether he saw or not would not be controlling,—in fact not even essential."

And, as was said by Mr. Justice Brewer, in Elliott v. Chicago, etc. Ry. Co. 150 U. S. 245, 37 Law. Ed. 1068:

> "This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his suroundings, makes perhaps a mistake in choice as to way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking ordinary precautions imperatively required of all who place themselves in a similiar position of danger."

To the same effect:

Sours v. Great Northern Ry. Co., (Minn.) 87 N. W. 766;

Anson v. Northern Pacific Ry. Co., (Wash.) 87 Pac. 1057;

Gaffney v. New York etc. Ry. Co., (R. I.) 7 Atl. 284;

Wabash R. Co. v. Skiles, (Ohio) 60 N. E. 576.

And the rule is thoroughly well settled that

making use, without necessity, of an appliance or instrumentality of the master for a purpose not contemplated or intended, causing injury, where the servant by the exercise of ordinary care should have seen or known that such use was fraught with danger, there cannot be a recovery.

McCain v. Chicago, B. & O. R. Co., (C. C. A.) 76 Fed. 125;

Quirouet v. Alabama G. S. R. Co., (Ga.) 36 S. E. 599;

Gillett v. General Electric Co., (Mass.) 72 N. E. 255;

Interstate Coal Co. v. Shelton, (Ky.) 153 S. W. 1;

The Persian Monarch, (C. C. A.) 55 Fed. 333.

III.

The court below, recognizing the rule that the master cannot be held liable for injuries caused by the unauthorized use of an appliance or instrumentality, nevertheless instructed the jury that it would not preclude a recovery in plaintiff's favor, if the defendant should reasonably have anticipated, and ought to have known, that the board was likely to be used as a place to step or stand upon,

when taking down merchandise from the platform to the floor below. We have already called attention to the fact that there is no intimation given, either in the pleadings or in the proof, that the shelf ever had been used for such purpose, or that anyone had ever been observed to make such use of it. There is no suggestion in the entire record, from beginning to end, that anything had occured, prior to the accident in question, tending to impart knowledge, either actual or constructive, that the shelf was used as a standing or stepping place. Nor is there any claim or pretense that in its position or appearance there was anything deceptive or misleading about it, leaving room for an inference that someone might possibly conceive a mistaken or erroneous notion as to its purpose and nature. It was in plain sight from the floor below, and from the floor of the platform above. It was obvious to anyone looking at it that it was not a part of the platform, and that it rested simply on cleats, fastened to the sides of the posts or pillars which supported the platform. There was nothing in the conditions which existed, and nothing had previously occurred, to suggest to anyone the likelihood that the shelf might be mistaken for something else, or that it might be made use of to serve a different purpose.

In Morrison v. Burgess Sulphite-Fibre Co., (N. H.) 47 Atl. 412, the plaintiff was injured by falling

through the canvas covering of an elevator, which was a box or trough 26 inches wide, extending at an incline of about forty-five degrees from the basement of the building to the ceiling of the fourth floor, where it turned at nearly right angle down towards the floor. It was built to lift material used in the upper story from the basement by means of a belt, to which heavy iron buckets were attached, running inside the box or trough. That part of the elevator which turned back connected with an open box and was called the "conveyor." A few feet of that end of the elevator which connected with the conveyor, and that end of the conveyor, were covered with canvas, the rest being covered with boards. At the time of the accident the canvas was so thickly covered with chips and dust that it could not be readily distinguished from the adjacent board covering, and it appeared to one facing it like flat surface of wood. Plaintiff and other employees were engaged in putting up a bridgetree in the fourth story of the building, one end of which extended over the top of the elevator. Being unable to place the bridgetree in position on account of an obstruction, the plaintiff stepped upon the canvas covered part of the elevator, intending to stand there and remove the obstruction. He lost his balance, fell upon the canvas, which gave way, precipitating him onto the elevator buckets. He had helped to build the elevator, and knew that

the man who had charge of the work intended to cover the elevator with boards, and thought that it was so covered and safe to stand upon. The defendants knew that a part of the elevator was covered with canvas, but they had not informed the plaintiff of it. In reversing the judgment in favor of the plaintiff, rendered by the trial court, the supreme court of New Hampshire said:

> "If this elevator was a part of their premises, they owed him no duty to so cover it that he could safely use it as he did. They did not put the coverings on their elevators for their servants to stand on, and it did not appear that they ever before had been used in that way. A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. McGill v. Granite Co. (N. H.) 46 Atl. 684. If this elevator was a tool or appliance, the defendants owed the plaintiff no duty respecting it at the time of the accident, for he was then putting it to a use for which he knew it was not intended; and, although it is a master's duty to use due care to furnish his servants tools and appliances suitable for

the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended. Young v. Railroad Co., 69 N. H. 356, 41 Atl. 268. There is no force in the plaintiff's claim that the defendants set a trap for him when they covered this part of their elevator with canvas, and did not tell him of the fact; for a master sets a trap for his servant only when he invites him into a dangerous situation, or creates or suffers one to exist in a place where he knows or ought to know his servant is likely to go. Sweeny v. Railroad, 10 Allen. 368. The case does not show that the defendants either intended for the plaintiff to use this elevator as he did, or knew, or were in fault for not knowing, that he was likely to do so. *A person is not in fault for not knowing particular facts unless circumstances exist which would put a man of average prudence upon inquiry* (Shea v. Railroad Co., 69 N. H. 361, 41 Atl. 774), *and no such circumstances were shown.*" (Italics ours.)

In Chicago R. I. P. Ry. Co. v. Murray, (Ark.) 109 S. W. 549, one of the cars of the defendant company was not provided with proper standards, which were used for "the protection of material on the car, and for the protection of the employees

of the company to keep things from falling off when the cars are being switched." The standard ordinarily used was a piece of wood six by six, cut down to four and one-half inches so as to fit in the socket on the side of the car. In place of the standard ordinarily used, angle bars had been substituted, which did not fit tightly in the sockets. On the night of the injury, the plaintiff in giving signals to the engineer when approaching some cars that were standing upon the track, had hold of the angle bar with one hand while giving signals with the other, when the angle bar turned in the socket, throwing him upon the track and inflicting the injuries complained of. There was no evidence that standards were provided in order to furnish hand holds for brakemen, and in reversing the judgment for the plaintiff, the court said:

> "The purpose of the standards being to keep the material on the flat cars from falling off when the flat cars were being switched, appellant was not negligent in the matter of furnishing standards so long as the standards it provided served the purpose for which they were intended. There is no evidence in the record that the standards which were being used at the time appellee received his injury were insufficient for the purpose of keeping things from falling off the cars when they were being

switched." * * * True appellee gave the slow signal in this way, and testified that all the brakemen he ever worked with did the same thing. But this did not establish that it was a proper method, or that it was so continuous and notorious that the sompany must have known it and sanctioned it. *In the absence of proof from which such knowledge and acquiescence on the part of the company could be inferred, it would not be liable for failing to exercise ordinary care to furnish appliances that would make the methods adopted by its employes without its knowledge and acquiescence, safe.* See St. Louis, Iron M. & Sou. Ry Co. v. Caraway, 77 Ark. 405, 91 S. W. 749." (Italics ours.)

In Jayne v. Sebewaing Coal Co., (Mich.) 65 N. W. 971, the plaintiff was injured as he was taken out of the defendant company's mines by means of a cage used in a perpendicular shaft in lowering and taking out defendant's employees. The wire rope used in operating the cage was fastened to an eyebolt on the upper side of a crossbeam, extending through its center, and fastened on the underside by a nut. The eyebolt had become loose, letting it down about three-quarters of an inch when the cage was at rest in the bottom of the shaft, and when the plaintiff stepped upon the cage, he placed

his hand around the nut, and as the cage was put in motion, the nut was drawn up crushing one of his fingers. The trial court left it to the jury to determine whether it was negligence to leave this space, and whether the plaintiff had exercised proper care in placing his hand on the nut. Reversing the judgment rendered in favor of the plaintiff, the court said:

> "In our opinion the court should have directed a verdict for the defendant. The nut was not intended as a hand hold, and there was no necessity for the plaintiff to use it as such. *The defendant was not chargeable with knowledge that its employes would use the nut for that purpose.* Parties are not liable for negligence where their machinery and appliances are in proper condition for the use for which they were intended. When employes use them for a purpose and in a manner for which they are not intended, they alone are chargeable with fault, if injury results." (Italics ours.)

To the same effect:

> Graham v. Chicago, St. P. M. & O. Ry Co., 62 Fed. 896;
>
> Salisbury v. Press Pub. Co., (Neb.) 108 N. W. 136;

Crebarry v. National Transit Co., 28 N. Y. Supp. 291;

Felch v. Allen, 98 Mass. 572.

IV.

The court correctly instructed the jury that when the plaintiff took employment, the defendant had a right to assume that he had the reasonable skill and experience ordinarily required for such work, and that the law held the plaintiff to the exercise of reasonable care for his own safety in doing his work; that the master was not bound to take more care of the plaintiff than the plaintiff could reasonably be expected to take for himself, and that it was plaintiff's duty to take reasonable precautions to avoid injury. This is all settled law, and the law is equally well settled that the master, in providing a place for work, and in furnishing the appliances or instrumentalities with which to do the work, has the right to assume that the obligations which are imposed upon the servant will be complied with, and that he will take care of himself. As was said by the Court of Appeals in American Bridge Co. v. Seeds, 144 Fed. 605, page 609:

> "There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natur-

al and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practical basis for the measurement of the acts, rights, or remedies of mankind."

And as was said by the same court in Fairbanks, Morse & Co. v. Walker, 160 Fed. 896, page 897:

> "Just as employees may rely upon the performance by the employer of his positive duty to them, so may he rely upon their exercise of ordinary care in doing their work, and neither is required to anticipate and make provisions for the other's default."

> "When men are hired,"

says the supreme court of Pennsylvania, in Pittsburg etc R. Co. v. Sentmeyer, 37 Am. Rep. 684, page 686,

> "something must be predicated of their judgment and prudence, and hence when the employer furnishes them with tools and appliances, which though not the best possible may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents."

Precisely the same principle was announced in

Pulley v. Standard Oil Company, (Mo.) 116 S. W. 430, where the court, on page 431, said:

> "The master is not required to have infallible judgment, and he should not be held responsible for a mistake which the exercise of reasonable care, by a competent man, would not avoid. Otherwise he would be an insurer of the safety of the servant, and all agree he is not that. Furthermore, the master, in directing that a servant perform a certain service, has a right to assume that the servant himself will exercise ordinary care in the act of performing such service, and, if more than one servant is jointly performing the service, he has a right to presume that each will act with the ordinary care of one in that situation in regard to the safety of the others. Otherwise he would be an insurer against the negligence of a fellow servant, and no one will contend that he occupies such onerous relation to his servant as that."

What evidence is there disclosed in the record of this case which would even suggest to anyone that the shelf might be used as a place to stand or step upon? No one ever had made use of it for that purpose, or seen it so used. No one pretends to say that its position or appearance was such as to give rise to any mistaken inference or impression as

its purpose and character, nor is it claimed that there was any mistake on the part of the plaintiff, which caused him to make use of it as a place to stand or step upon. He claims that he had failed to notice the shelf, not because of his inability to see it, or want of opportunity to know all about it, but simply because he "never paid any attention to it."

The defendant had the right to assume that the plaintiff would pay some attention to it and familiarize himself, to some extent at least, with his environments and surroundings, and act upon that assumption. The defendant was not, in the words of the supreme court of New Hampshire, in Morrison v. Burgess Sulphite-Fibre Co.,

> "in fault for not knowing particular facts unless circumstances existed which would put a man of average prudence upon inquiry,"

and as there, so here,

> "no such circumstances have been shown."

The duty which the court, by its instructions, imposed upon the defendant was to anticipate and know that a particular thing was likely to be done, not because it had ever been done before, and not because the situation was such as to make it probable that it would be done, but it imposed such duty upon defendant to anticipate and know, by infer-

ring that defendant's servants would be derelict in their duty, and fail to exercise at least some degree of care, and by further inferring that they would make use of a shelf as a place to step or stand upon, when there was nothing by way of occurrences in the past, or in the conditions which then existed, to suggest it. The court imposed the duty upon the defendant to anticipate and know, when the only source of knowledge was inference piled upon inference and conjecture piled upon conjecture, which may not be done.

As was said by the court in Missouri Pacific Ry. Co. v. Porter, (Texas), 11 S. W. 324, on page 326:

> "It is not admissible to go into the domain of conjecture, and to pile one presumption upon another." (Citing U. S. v. Ross, 92 U. S. 284).

> "Without the fact being shown,"

says the supreme court of New Hampshire, in Cole v. Boardman, 4 Atl. 572, on page 575.

> "the jury were asked to presume that the Massachusetts suits were unjust and oppressive, and from that presumed fact to further presume that this suit is unjust and oppressive. This would be an inference from an unauthorized inference; one presumption resting on

another that rested on nothing. The law of evidence requires an open, visible connection. between the principal and evidentiary facts, and the deductions from them, and does not permit a decision to be made on groundless inferences."

The same principle was announced by the Court of Appeals in Cunard S. S. Co. v. Kelly, 126 Fed. 610, on page 615 where the court said:

"The suggestion in the brief of the defendant in error that Rondino was 'under at least a moral duty' is insufficient. To infer, therefore, that Rondino must have been vigilant with reference to this shipment of goods, which were not then in possession of the Cunard Company, and then to interpret his testimony that he 'made sure that the goods which went aboard the ship were really the goods deposited in the Punto Franco,' to include 'the fact that they went aboard the ship properly marked, and that they were goatskins or kidskins, because otherwise—presumably as his duty required—he would have observed the difference in the packing and covering and the falsification of the marks, and would at once have informed the master of the shop in reference thereto,' is to base a presumption that Rondino must have seen the marks upon another

presumption that his duty required him to do so."

It is manifest, therefore, that the plaintiff failed to make a case entitling him to any recovery, and the judgment should be reversed.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit.

STONE-ORDEAN-WELLS COMPANY,
a corporation,

Plaintiff in Error,

vs.

WILLIAM A. HANSFORD,

Defendant in Error.

Brief of Defendant in Error.

ARGUMENT.

The errors of which complaint is made and which are referred to by plaintiff in error are three.

One arises from the refusal of the Court to sustain defendant's motion for direct verdict.

The others from two instructions (Tr. p. 105-7.)

The legal question presented by the instructions given may be stated as follows: Is the master liable where a portion of his premises are unsafe for a use made by an employee, which might reasonably have been anticipated, although not originally intended for such use, and there is no negligence on the part of the servant?

It will be admitted we believe that the defendant cannot in this case evade liability, by reason of want of knowledge, actual or constructive.

This insufficiently supported board and the want of a railing along the edge of the platform was as to the first the act of the master, and in addition had existed for so long a time as that its condition should have been known by the exercise of ordinary care—the duty of inspection.

As to the railing, it was admitted none existed.

The evidence shows that the use made of the insufficiently supported board was one which might have been reasonably anticipated. It is shown by the manner of construction and by the evidence of the witness Chadwick (Tr. p. 58) "In passing by this board on the floor be-

low, unless a person absolutely knew they would take it to be originally a part of the platform."

Thus is presented the question whether the plaintiff is to be relieved because he did not intend to have this board used to step upon or as a part of the platform.

We beg to here suggest to the Court that the board or shelf ought not properly to be considered an appliance, as the word is generally used in relation to the proposition that a master has fulfilled his duty if the appliances or instrumentalities were reasonably suitable and safe for the use intended.

While the word "appliance" has been used and construed as premises, in its generally understood meaning it has reference to tools, special machinery and devices used by employes in carrying on their labor.

The facts disclosed by the transcript shows that it was so much a part of the structure upon which plaintiff was working as to be a part of the place, which the law requires shall be reasonably safe to those who are directed to work about it.

However, even admitting for the purposes of the argument that it was an appliance or instrumentality, yet where such a condition exists as is shown here, no Court has yet held as a

matter of law that the employer is relieved from liability simply because he did not intend the alleged appliance was to be so used. The case cited by defendant, Shea v. Railroad Company, 46 N. H. 684 (P. 28 Arg.) recognizes the rule adopted by the trial Court.

> "A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows, or ought to know, they are accustomed to use while doing it."

In the case of Jayne v. Sebewaing Coal Co., 65 N. W. 971 (Mich.) quoted by defendant the language italicized (Ar. p. 32) recognizes the very rule the Court below gave, for it is there stated that in the particular case then being considered, "defendant was not chargeable with knowledge that the employer would use the nut for that purpose." There is no intimation that in all cases where a use of an appliance is made different from that intended, the employer is never chargeable with knowledge, or that where such knowledge is shown, either actual or constructive, he would not be liable.

The rule is clearly stated by Labatt in his

late work on master and servant (Last Ed.)

> "1041—It is the duty of the master having control of the times, places and conditions under which the servant is required to labor, to guard against probable danger in all cases in which that may be done by the exercise of reasonable caution. He is therefore negligent if in the ordering of his business and the selection of his plant, he fails to provide for contingencies which are likely or not unlikely to occur."

No one, of course, would contend that he should anticipate the injury in the precise way that it did occur, but only that some injury might result.

As stated in Texas & c. Ry. Co. v. Carlin, 49 C. C. A. 609, subsequently affirmed by the U. S. Sup. Court:

> "The fact that it happened to cause the injury in a manner so unusual that it was not to be expected cannot prevent the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negligence in this case produced an effect not before observed, the circumstances of which could not have been anticipated. But if it was negligence like-

> ly to produce other and familiar injuries the peculiarity of the accident does not prevent liability. The extraordinary circumstances attending the injury cannot serve as a defense."

In the instant case the board so insufficiently supported was placed by the employer and allowed to so remain where it would appear to be a part of the original platform, and so likely to be made use of as such by employees. Some danger to those at work upon the platform or in its use by employees ought reasonably to have been expected; if so, then it is no defense that defendant did not actually know of the use made, or that it did not intend it to be so used.

Whether this anticipated use might be reasonably expected by the defendant was properly submitted to the jury, for to say the least, it was a question under the evidence upon which reasonable minds might differ.

Defendant's counsel are clearly in error in stating on page 35 of the argument:

> "No one pretends to say that its position or appearance was such as to give rise to any mistaken inference or impression as to its purpose or character."

Mr. Chadwick, who placed the board in its position and was in the employ of defendant, says: "Unless a person absolutely knew they

would take it to be a part of the platform."

If any one has the right to complain of the Court's requirement that the particular use made of this board should have been anticipated, it is certainly not the defendant. The Court would have been clearly within the law had he stated that it was for the jury to say whether the defendant ought to have known that in the use of the shelf by the employees some injury would result by reason of its insufficient support. He did, however require the jury to find that the defendant should have reasonably anticipated that in handing down merchandise its employees were likely to step on the board.

The jury so found, and were warranted under the proof in making such finding.

If the defendant ought reasonably to have anticipated a use of this board to step upon in working on the platform or handing down bulky articles, it became the duty of defendant to place under the board sufficient support to render it reasonably safe, or to erect a railing around the edge of the platform which would have prevented its use as a stepping place. His failure to do either was negligence, and the Court so instructed.

The defendant in argument seeks to avoid the effect of its admission that no railing existed about the platform, by claiming that no evi-

dence was offered that a railing would have prevented plaintiff's stepping on the board. We need only call the Court's attention to the circumstances. Plaintiff was handing down over the edge of this platform crated coffee cans; they were bulky and weighed about fifteen pounds each. The platform was about nine feet above the floor of the warehouse. It became necessary then to step to the very edge in order to lean over and lower the can far enough to allow the employee on the floor below to get the can in his hands.

It is perfectly apparent to any person that under such circumstances a railing of any sort along the edge of the platform proper would have prevented the use of this board as a stepping place. Such a railing would not in the least have interfered with the use of the platform. It certainly does not require the statement of any witness that a rail or guard of itself would prevent the use of the board. It is so apparent on the face of it that the mere statement is of itself sufficient.

No improper burden was therefore cast upon the defendant as to the degree of care required, nor was liability of defendant recognized by the instructions upon any insufficient proof.

Not only did the Court in its instructions

state the law, but stated it in a manner more favorable to defendant that it was strictly entitled to.

II.

We here wish to briefly discuss the question of plaintiff's imputed knowledge of the risk.

The plaintiff, of course, had the right to rely upon and assume that the defendant had so performed its duties that he would not be subjected to any abnormal dangers, and that all work of construction about the premises had been prudently done.

Labatt M. & S. # 1270 and 1271.

How far he may rely on this assumption is perhaps a question for the jury. It is not his duty to make inspection, and it is only as to those dangers which are obvious and manifest, where opportunity and all the circumstances surrounding him suggest observance, that the knowledge is imputed. In this case the danger was not obvious and manifest.

In the first place the plaintiff had never before been placed in this situation. While he had been upon the platform at other times, it was to carry down articles by the ladder or pitch them down to others below. (Tr. p. 40.) At the time of the accident in question the plaintiff was carrying with both hands a bulky empty crated coffee can, weighing fifteen

pounds. His attention was directed to handing it down to his fellow employee. It does not appear therefore he should have taken notice of the danger at the time. Under these circumstances the master's liability is established so far as this element is concerned.

Ills. & St. L. Ry. Co. v. Whalen, 19 Ills. App. 116.

Sweet v. Mich. Cent. Ry. 87 Mich. 559, 49 N. W. R. 882.

Elldge v. Nat. City & C. Ry. Co. 100 Cal. 282, 34 Pac. 720.

Labatt M. & S. No. 1321.

And the fact, if it be one, that another employee who had climbed up had seen the board and observed that it was lower than the platform (the witness gave no testimony as to its support) is not conclusive.

Pruke v. South Park etc. Co. 68 Minn. 305, 71 N. W. R. 276.

Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306.

In the case of Swoboda v. Ward, 40 Mich. 420, the plaintiff had worked in a mill for fourteen days carrying slabs from a gang saw. When injured he was walking backward carrying a plank, and he slipped back against some cog wheels. He had not been warned, never noticed them until he was hurt, and could have

seen them if he had stopped work and looked.

The Court says:

> "If he did not know of the exposed and dangerous condition of these cogs, then by remaining at work he was not doing something he should not have done, and the effort he was making, at the time of the accident, to remove the slab showed no want of due care on his part, but on the contrary was commendable. Even if he had known of the cogs and their unguarded condition it would not thereby conclusively follow that he could not recover."

As already stated, the evidence shows that the usual observation given to conditions as they existed, would lead to the conclusion that the board was a part of the platform. A special inspection would have been required to have known its actual condition. This was no part of plaintiff's duty. The defendant had constructed it, had afforded no protection against it, and the plaintiff had a right to assume and act as though it were reasonably safe.

Repeated references appear in plaintiff's brief to the language of plaintiff that the reason he did not know of the condition and situation of this board was because he had "paid no attention to it." This does not warrant the infer-

ence that he had failed to exercise ordinary care. By these words he meant, and was understood to mean by Court and jury, that he had in fact not observed it, had no occasion to do so, and had made no special inspection of it. Like all other employees, his time was constantly employed in actual manual labor. He neither had the time, nor was he under any legal obligation, to inspect defendant's premises where he was directed to work, to ascertain if they were reasonably safe. This, as already stated, he had the right to assume had been done for him by the defendant.

It is not sufficient to say, now that a serious injury has resulted, that it might have been seen by plaintiff, and that some safer way was open to have done the work. All the law requires of plaintiff was that as an employee, in view of his experience, capabilities, duties, etc., he should act as an ordinarily careful and prudent person would act under like circumstances. To this effect the jury were instructed by the Court. (Tr. p. 100.)

Counsel insist that plaintiff was a "mere automaton or machine, neither informing himself of conditions nor using his sight." That he shut his eyes and went about blindly oblivious to everything which was perfectly plain and obvious."

There is no justification for such language in this record, and its only excuse is unrestrained zeal.

It has long been the rule and of universal application, that where the evidence is of such a character that the proper inference to be drawn from it is a question with respect to which different opinions may not unreasonably be formed, the matter is one to be determined by the jury.

Labatt M. & S. # 1309 (2) and cases cited.

III.

There is some contention that the negligence shown and the case made was something other than that alleged.

It is of course true that a plaintiff will not be permitted to state one ground of negligence, and recover upon an entirely distinct ground. Such a case, however, is not presented by this record. An examination of the complaint shows a reasonably clear statement of the facts, with the grounds of negligence stated as consisting of a failure to provide this board with sufficient support, and also to provide a suitable railing along the outer edge.

It was not stated or claimed that the board was a continuation of the platform at the same level, but that this board was placed at the edge

of the platform and that it was of the same kind and dimension as those used in the platform. All these facts were established by the proof. If by reason of such construction and maintenance the place where plaintiff was called upon to work was rendered unsafe, the defendant was negligent.

It is not necessary to allege that the condition created was a pitfall, or deceptive and misleading to the employees. Such would be an averment of conclusion. The facts being stated, if it appears by the proof that a condition existed rendering the place unsafe, and that in the use thereof injury results, the defendant becomes liable, and this is true whether it is called a pitfall, a concealed danger, or an invitation to use that which was insufficiently prepared for one purpose, when intended for another use.

The case was tried and defended upon the exact issue tendered, to-wit:— the existence, created and maintained by defendant, of an unsafe place in which plaintiff was required to work.

We beg to refer briefly to some of the cases cited by defendant on this branch of the case as supporting the contention that one cause of action was alleged by plaintiff and another proved.

In Feder v. Field, 20 N. E. 131, from which

an excerpt was quoted, the complainant did not seek damages against all defendants, but sought damages as to some and auxiliary relief as to others on the ground of fraudulent vendees. In the Apellate Court it was contended for the first time plaintiff was entitled to damages against all.

In Kuckey v. Butte Elec. R. Co., 41 Mont. 314, the plaintiff alleged an injury was received while getting off a car which had stopped, by a sudden start of the car. The plaintiff's evidence showed an acceleration of speed; that he got off while the car was in motion and before it had come to a stop.

In Bracey et al v. Northwestern Imp. Co., 41 Mont. 338, the complaint alleged the injury was caused by spontaneously generated gases, while the evidence showed they were generated by fire.

In Gregory v. C. M. & St. P. Ry., 42 Mont. 551, the negligence complained of was a defective appliance. The proof showed the machinery was started without giving plaintiff time to reach a place of safety.

In Ebsery v. Chgo. City Ry. (Ill.) 45 N. E. R. 1017, the special findings was inconsistent with the general verdict, and with the complaint.

In Gardner v. Ry. Co., 18 Am. Cases 1166,

the complaint alleged a projection on the West side of a railway and that plaintiff was going South. The proof showed a projection on the East side on another track and plaintiff going North.

In Pennington vs. Ry. Co., 51 N. W. R. 634, the complaint alleged the train was moving down an incline uncontrolled. The proof showed it was going up grade by order of Conductor in charge.

Citations of the above character have no relation to the question suggested in this case. The proof here exactly met the averments of the complaint, while all that any Court has ever required is that the proof substantially support the specific grounds alleged. It is submitted therefore that upon the three propositions argued, no error of which defendant has ground of complaint exists in the record.

Counsel for plaintiff are unable to attend upon the oral argument, and submit the cause upon the written brief.

Respectfully,
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Attorneys for Defendant in Error.